Supreme Court, U.S.
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88-1443

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

No. _____ ,

EDWIN S. BILLHIMER,

*Petitioner,*

v.

MARYLAND ADMINISTRATIVE BOARD OF ELECTION LAWS,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, MARYLAND

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## QUESTIONS PRESENTED

1. Whether the Equal Protection Clause of the 14th Amendment was violated by the classifications created by the Maryland Court of Appeals opinion establishing two groups of state employees, one exempt from and the other subject to the state merit system law, without any relationship or legitimate state interests for the distinctions.

2. Whether there is a constitutional right to have a state court's decision conform to the majority opinion of the greater number of appellate judges deciding the case.

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EDWIN S. BILLHIMER,

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STATE OF MARYLAND,

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PETITION FOR A WRIT OF CERTIORARI

TO THE

COURT OF APPEALS, MARYLAND

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## STATEMENT OF JURISDICTION

The order sought to be reviewed by this Petition was entered on October 31, 1988, by the Maryland Court of Appeals

reversing the decision of the Maryland Court of Special Appeals that had affirmed the decision of the Circuit Court. A rehearing through a Petition for Reconsideration was sought in the Maryland Court of Appeals which was denied December 2, 1988. On December 2, 1988, the mandate of the Court of Appeals was issued.

This Petition for Writ of Certiorari is authorized by 28 U.S. C. §1257 pursuant to 28 U.S.C. §2101(c) and Supreme Court Rule 20 permitting ninety days from the final order denying a rehearing by the highest state court in which to file the Petition.

## QUESTIONS PRESENTED

1. Whether the Equal Protection Clause of the 14th Amendment was violated by the classifications created by the Maryland Court of Appeals opinion establishing two groups of state

employees, one exempt from and the other subject to the state merit system law, without any relationship or legitimate state interests for the distinctions.

2. Whether there is a constitutional right to have a state court's decision conform to the majority opinion of the greater number of appellate judges deciding the case.

## CONSTITUTIONAL PROVISIONS

U.S. CONST. amend XIV, §1

Section 1. Citizens of the United States.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTORY PROVISIONS

MD. ANN CODE art. 33, §1A-1 (1986)

Section 1A-1. Creation, composition, powers, etc., of Board; State Administrator of Election Laws; meetings with election boards.

(a) Creation and composition of Boards; appointment and terms of members; qualifications; vacancies; expenses; chairman. -- There is hereby created a State Administrative Board of Election Laws consisting of five members. The members of the Board shall be appointed by the Governor with the advice and consent of the Senate of Maryland and shall be residents and voters of the State of Maryland for five years preceding their appointment and during the time of acting as a member of this Board shall not hold any public or party office or be a candidate for any public or party office. The term shall be for a period of four years. In case of a vacancy on the Board by reason of death, resignation or otherwise, occurring when the Senate is not in session, the Governor shall appoint some eligible person to fill the vacancy until the end of the next session of the General Assembly or until some other person is appointed to the office, whichever first occurs;

provided that the appointee must be a member of the same political party as the individual whom he replaces. Of the five members appointed to the Board three shall be of the majority party and two shall be of the minority party. The members of the Board shall receive per diem compensation as provided in the budget for each day actually engaged in the discharge of his official duties as well as reimbursement for all necessary and proper expenses. The members of the Board shall elect one of their number as the chairman of the Board.

MD. ANN. CODE art. 64A, §1 (1988)

Section 1. Definitions.

In this article and in all rules made hereunder, unless the context otherwise requires -- "Commissioner" or "Secretary" mean the Secretary of Personnel appointed under Article 42, Section 213, of this Code. "The classified service" means and includes all offices of profit or trust and all places of employment, whether permanent of temporary, in the service of any State officer, department, commission, board, or institution, other that those in the military forces, and other that those enumerated in Section

3 of this article. "Classified service position" or "position" means any office or place of employment in the classified service. "Classified service employee" or "employee" means a person who holds under the terms of this article, a position in the classified service, but shall not include a person employed by contract to render a temporary special service for the State. However, all such contractual employment is subject to the provisions of Section 15A of this article. "Class of position" or "class" means a group established under the article or positions similar in respect to the duties and responsibilities thereof and the qualifications required therefor. "Classification title," "class title," or "title" means the designation given, under this article, to a class and to each position in the class and to the employee in each position in the class. "Appointing authority" means any commission, board or officer having power to make appointments.

MD. ANN. CODE art. 64A, §3 (1988)

Section 3. Positions excluded from system -- Enumeration.

(8) Members of boards and commissions and all other

persons holding positions by direct appointment from the Governor or from the Board of Public Works with the exception of the Motor Vehicle Administrator;

(9) All secretaries, chief clerks, and chief administrative officials of all State offices, boards, commissions, departments, and institutions as determined by the Secretary with the approval of the Governor;

(13) All positions in State offices, boards, commissions, departments and institutions, which the secretary may determine, with the approval of the Governor, require medical, engineering, scientific, educational or expert training and qualifications;

1920 Md. Laws, Ch. 41, §1 (1), (2), (3), (26), (27)

MD. ADMIN. CODE tit. 06.01.01.60

.60 Appeal of Termination of Employment of An Unclassified Employee

A. Notwithstanding the provisions of Regulation 101, an unclassified employee, except for unclassified and faculty employees of educational institutions, unless otherwise

provided by law, whose employment is terminated according to Regulation .62, may submit a written appeal to the Secretary within 5 working days after receipt of the notice of termination. The appeal is limited to the legal and constitutional bases for the termination.

B. The secretary or his designated representative shall hear the appeal within 30 calendar days after receipt of the written appeal. The Secretary shall render his written decision within 30 calendar days after the hearing. If the employee does not appeal the termination within the 5-day period set forth in §A, or if the employee does not appear at the scheduled hearing, the Secretary shall uphold the termination.

## STATEMENT OF THE CASE

A. "Statutory Facts" in This Case.

The statutory design is very simple and straightforward. Under Maryland Annotated Code Art. 64A, §1, all employees of the State are considered part of the classified service unless they have been

specifically exempted by some other part of the Code. Under the definition of "classified service", all positions in SABEL would be in the classified service unless otherwise exempted under §3 of the Code. Exclusions from the merit system in §3 are numerous. The section that is considered applicable to this case and on which the State relies states:

> (13) All positions in State offices, boards, commissions, departments and institutions, which the Secretary may determine, with the approval of the Governor, require medical, engineering, scientific, educational or expert training and qualifications. Maryland Annotated Code, art. 64A §3(13).

This part of this section at issue in this case is the "expert training and qualifications" exception. The Court of Appeals determined that any state employee with subject matter knowledge of the agency activities and administrative

experience is equivalent to an expert and the employee's position is exempt from classified service and the merit system.

B. Facts Concerning Respondent's Employment.

Edwin Billhimer was first employed by the State Administrative Board of Election Laws (hereinafter SABEL) as of August 11, 1971. On January 15, 1972, Appellee took the examination to qualify for the merit system job with the State. The "qualifying" rating was sent to him in an envelope postmarked January 24, 1972. Since he had already been "selected" from whatever competition there had been for his position, it was superfluous to place him on an eligibility list from which he could have been selected for employment. Over time, he was promoted and, finally, he became the Deputy Administrator of SABEL.

On December 10, 1982, SABEL, through its then-Administrator, Willard A. Morris, mailed to Appellee a letter terminating Appellee's employment as Deputy Administrator of SABEL "effective at the close of business on December 31, 1982." That letter advised Mr. Billhimer of his right to appeal under Personnel Rule 60 (COMAR 06.01.01.60) and added that "any such appeal is limited to an inquiry into whether illegal or unconstitutional reasons existed for the termination." This statement in the letter was an indication that SABEL considered Mr. Billhimer to be an "unclassified" employee within the State Merit System.

The evidence does show that the Deputy Administrator's position was created because of an administrative need. Someone was needed to take care of "day-to-day" operations and to fill in for

the Administrator when he was absent. There is nothing to show that this person needed specialized skill of the kind enumerated in §3(13).

The evidence that best shows the reasons that the Deputy Administrator's position was exempted from classified service are the 1969 memo stating that there is a close relationship between the Executive Department and SABEL and the Department of Public Works memo indicating that the position is "sensitive". This evidence does not satisfy the statutory requirement for exemption, namely, that there must be a determination that technical expertise of an expert is required for the position and it should be unclassified.

The only evidence submitted showing that the Governor agreed with the finding of expertise are the 1969 memo and the

transcript of the very brief, casual discussion by the Department of Public Works. Nowhere is there any discussion or evidence to show that the Governor agreed with findings that technical expertise was required and that the position should be unclassified. In fact, the Board of Public Works memo indicates that the legislature made no determination that would exempt SABEL employees from being in the classified service, much less the specific position of Mr. Billhimer.

Lastly, there is absolutely no evidence in the record to show that the actual position of Deputy Administrator required special training qualifications as set out by the statute, §3(13). There is nothing to show that the attempt to "unclassify" the Deputy Administrator's position is anything beyond subterfuge.

On appeal from the adverse decision

of the Department of Personnel, the Circuit Court for Anne Arundel County determined that Mr. Billhimer was a member of the classified service. The thirteen judges in the Maryland Court of Special Appeals affirmed the lower court's decision. In the Maryland Court of Appeals, with two judges dissenting, the decision was reversed. The Court determined that state employees who had administrative experience and were knowledgeable about the substantive matters with which the agency dealt were substantially equivalent to the statutory requirement for expert training and qualifications.

## REASONS FOR GRANTING THE WRIT

I. WHETHER THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT WAS VIOLATED BY THE CLASSIFICATIONS CREATED BY THE MARYLAND COURT OF APPEALS OPINION

ESTABLISHING TWO GROUPS OF STATE EMPLOYEES, ONE EXEMPT FROM AND THE OTHER SUBJECT TO THE STATE MERIT SYSTEM LAW, WITHOUT ANY RATIONAL RELATIONSHIP OR LEGITIMATE STATE INTERESTS FOR THE DISTINCTIONS.

The Maryland merit system statute, as interpreted by the Maryland Court of Appeals, violates the Equal Protection Clause of the Fourteenth Amendment. The Court constructed a broad interpretation of the classification created by the statute and rendered the distinctions drawn by the statute meaningless, arbitrary and capricious. There is no legitimate state interest consistent with the distinctions created by the Maryland Court of Appeals in its decision.

When state statutes create distinctions among classes, the classifications must be based on

reasonable objectives of the legislation. New York Rapid Transit Corp. v. New York, 303 U.S. 573, 83 L.Ed. 1024, 48 S.Ct. 721, reh. denied, 304 U.S. 488, 82 L.Ed. 1548, 48 S.Ct. 939 (1938). Constitutional tenets are violated when the classifications rest on grounds or criteria irrelevant to the achievement of a state's valid objective. Reed v. Reed, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251 (1971); Turner v. Fouche, 396 U.S. 346, 25 L.Ed.2d 567, 90 S.Ct. 432 (1970). This traditional equal protection analysis rests upon whether the classification under the statute is rationally related to legitimate governmental interests. United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 37 L. Ed.2d 782, 93 S.Ct. 2821 (1973). The equal protection clause requires that the classification must treat all similarly situated people in the

same way. Stanton v. Stanton, 421 U.S. 7, 43 L.Ed. 2d 688, 95 S. Ct. 1373 (1975). Reasonableness is a case by case decision. Griffin v. County School Board, 377 U.S. 218, 12 L.Ed.2d 256, 84 S.Ct. 1226 (1964). Classifications created based upon political affiliations are arbitrary and violate equal protection. American Sugar Refining Co. v. Louisiana, 179 U.S. 89, 45 L.Ed. 102, 21 S.Ct. 43 (1900).

For a classification to be valid, it must rest upon material differences between persons and activities and be based upon substantial distinctions. Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 81 L.Ed. 109, 57 S.Ct. 139 (1936); Nebbia v. New York, 291 U.S. 502, 78 L.Ed. 940, 54 S.Ct 505 (1934); State Board of Tax Com'rs. V. Jackson, 283 U.S. 527, 75 L.Ed. 1248, 51 S.Ct.540 (1931); Frost v. Corp Com of

Okla., 278 U.S. 515, 73 L.Ed. 483, 49 S.Ct.235 (1929); New York ex rel Bryant v. Zimmermann, 278 U.S. 63, 73 L.Ed. 184 (1928). The differences must have a substantial, natural, reasonable, and just relation to the object for which the statute is enacted. Maryland has acknowledged these principles and added that the classifications, "...to be valid, must be based on reasonable grounds. It must not depend on distinctions which do not furnish any proper basis for the attempted classification." State v. Broadbelt, 89 Md. 565, 43 A. 771 (1899). The classifications "...cannot be a mere arbitrary selection." Id.

The statutes at issue in this case created the merit system of Maryland with an avowed purpose of preventing the arbitrary replacement of state employees at the whim of the elected officials.

State Admin. Board of Election Laws v. Billhimer, 72 Md. App. 578, ____,531 A.2d 1298, 1304 (1987)(Chief Judge Gilbert), reversed, 314 Md. 46, 548 A.2d 819 (1988); Secretary, Md. Dept. of Personnel v. Bender, 44 Md. App. 714, 715, 411 A.2d 107, 108 (1980). One of the purposes of the merit system was "'...to provide standards of employment and advancement, ... intending to avoid problems inherent in political spoils systems, such as nepotism and related abuses.'" Id. The Court of Special Appeals determined that the process for exempting employees fell within this purpose and that Billhimer was "...entitled to its [the exemption statue's] fair and accurate application." 72 Md. App. at 578, 531 A.2d at 1304-05.

Maryland's law mandated that all state employees are considered merit system employees unless specifically

exempted. The exemption statute established the criteria to apply to determine whether a position can be exempted. In interpreting these criteria generally and broadly, the Court of Appeals of Maryland destroyed the distinctions of the statute and granted the elected officials unfettered discretion to exempt any state employee from the merit system.

The statutory design is very simple and straightforward. Under Maryland Annotated Code Art. 64A, §1, all employees of the State are considered part of the classified service unless they have been specifically exempted by some other part of the Code.

§1. Definitions.

> In this article and in all rules made hereunder, unless the context otherwise requires -- 'Commissioner' or 'Secretary' mean the Secretary of Personnel appointed under Article 41,

> §213, or this Code. 'The classified service' means and includes all offices of profit or trust and all places of employment, whether permanent or temporary, in the service of any State officer, department, commission, board or institution, other than those in the military forces, and other than those enumerated in §3 of this Article. 'Classified service position' or 'position' means any office or place of employment and the classified service. 'Classified service employee' or 'employee' means a person who holds under the terms of this Article, a position in the classified service, but shall not include a person employed by contract to render a temporary special service for the State. Maryland Annotated Code Art. 64A, §1 (emphasis supplied).

There is no doubt that the Maryland State Board of Election Laws (hereinafter SABEL) is a State agency or board. See Maryland Annotated Code, Art. 33 §1A-1; County Council from Montgomery County v. Montgomery Association, Inc., 274 Md. 52, 333 A.2d 596 (1975). Under the

definition of "classified service", all positions in SABEL would be in the classified service unless otherwise exempted under §3 of the Code.

Exclusions from the merit system in §3 are numerous. The section that is considered applicable to this case and on which the State relies states:

> (13) All positions in State offices, boards, commissions, departments and institutions, which the Secretary may determine, with the approval of the Governor, require medical, engineering, scientific, educational or expert training and qualifications. Maryland Annotated Code, art. 64A §3(13).

This section establishes the requisites for exempting a State employee's position from classified service and rendering it an "unclassified" position.

Maryland's Merit System was created in 1920 to exclude the abuses of political patronage and improve the efficiency of

State employment. See 1920 Md. Laws, Ch. 41 §1 (1),(2), (3), (26), and (27); see generally R. Vaughn, Principles of Civil Service Law §s 1.2, 1.3 (1976). At the time, Maryland was in the vanguard of reform-minded State government, being the tenth state to enact the Merit System Law. See O. G. Stahl, Public Personnel Administration 33 (6th ed. 1971).

As remedial legislation which it was considered, it must be liberally construed so as to give effect to the legislative intent. State v. Barnes, 273 Md. 195, 328 A.2d 737 (1974); Culotta v. Raimondi, 251 Md. 384, 247 A.2d 519 (1968).

Exceptions to remedial legislation must be narrowly and strictly construed. Hutchinson Bros. Excav. Co. v. District of Columbia, 278 A.2d 318, 321 (D.C. App. 1971) [citing United States v. Dotterweich, 320 U.S. 277, 64 S. Ct. 134,

88 L. Ed. 48 (1943)]; United States v. Articles of Drug, Thyroid Tablets, 306 F. Supp. 247, 251 (D.C. App. 1969). Therefore, if there is any ambiguity or doubt as to whether Appellee's position was exempted and rendered an "unclassified" position, then the doubt should be resolved in favor of Appellee and in favor of his being a member of the classified service.

The statutory requirements show that there must be evidence that Mr. Billhimer's position was specifically determined by the Secretary of the Department of Personnel to require "medical, engineering, scientific, educational or expert training and qualifications". There must be evidence to show that the Governor approved this determination of needed expertise and the creation of the position as unclassified.

In addition, the evidence must reveal that the position actually requires the kind of specialized ability described in §3(13) so that the determination is not being used as a subterfuge to avoid the Merit System Law.

Judge Cawood, sitting in the Circuit Court for Anne Arundel County on the appeal from the administrative agency, expressly set out these requirements in his Opinion dated December 7, 1986.

> We believe that §3(13), previously quoted, requires the following elements for proper exemption:
>
> 1. There must be a State position.
> 2. The Secretary of Personnel must determine that the opposition requires medical, engineering, scientific, educational or expert training and qualifications and should be unclassified.
> 3. The Governor must concur on that approval.
> 4. There must be at least some indication that such training and qualifications

> are required. In other words, this cannot be used as a subterfuge to defeat the system.

It is based on these criteria that the Judge determined there had been an error of law.

The Maryland Court of Special Appeals agreed and affirmed the Circuit Court in the determination that the law required there to be some technical type of education or training of an expert. The Maryland Court of Appeals agreed with the principles involved. 548 A.2d at 826-27. The critical difference for the Court of Appeals, however, was that it determined that experience as an administrator in state government was sufficient to fall within the statutory requirement of "expert training and qualifications." Id. The Court stated that the "...Deputy Administrator's responsibilities required

a broad knowledge of the electoral process, as well as the expertise needed to assume the function of the Administrator, if necessary. This was substantially equivalent to stating that the position required expert training and qualifications within the contemplation of §3(13). Id. The Maryland Court of Appeals reversed the intermediate appellate court:

> The fourth element was adequately established, we think, by the draft survey report and the December 1981 questionnaire describing the Deputy Administrator's duties. Both of these documents indicated that the Deputy Administrator'sresponsibilities required a broad knowledge of the electoral process, as well as the expertise needed to assume the functions of the administrator, if necessary. This was substantially equivalent to stating that the position required expert training and qualifications within the contemplation of §3(13). 314 Md. at 46,_____, 548 A.2d 819, 827.

In departing from the interpretation of the statute by the lower courts, the Court of Appeals broadened a limited exemption requirement of the statute to encompass any state employee. The rationale adopted permits any state employee who is knowledgeable about the work he or she performs (which everyone would anticipate to be the case) to be potentially exempted from the merit system at the whim of the elected or appointed officials. There is no distinction, thus, maintained by the Maryland statute. There is no reasonable relationship between the purpose of the statute to protect against the abuses of the patronage system that existed before 1920 and the power vested in the government officials by the interpretation adopted by the Court of Appeals. By so broadly interpreting the statute, the Court eliminated any rational or

legitimate reason for the classes created by the statute and eliminated the relationship of the statute to its purposes.

The statute, §3(13), created classes of persons in state offices to be exempted from the merit system if they met tne criteria of §3(13). This classification system met the legitimate government purpose of having all persons be a part of the merit system (removed from the whim of the elected officials) unless they had special expert training and qualifications for which they were hired. Interpreting the §3(13) requirement to apply to every experienced government employee as being tantamount to "expert training and qualifications" means that there is no longer a rational relationship to the classification of state employees. Any state employee who has substantive

knowledge of the job he or she perform and administrative experience as a state employee can be exempted now under §3(13) as being "substantially equivalent" to "expert training and qualifications". Since any employee can now be exempted in this way, there is no rational or legitimate relationship of the classes under the statute to the purpose of the statute.

The statute creates two classes of employees--those who are experienced administrators with substantive knowledge about the jobs they are performing who are in the merit system and those identically experienced and knowledgeable employees who are exempted under §3(13). In the context of the Billhimer facts, the Deputy Administrator of SABEL is exempted while any other Deputy Administrator of any other state agency (or a lower position,

if there is no Deputy) may be in or out of the merit system. There is no uniform policy exempting Deputy Directors of agencies from the merit system.

In theory, the elected officials now have unfettered discretion to decide which state employees may be removed from the merit system. The factors considered by the Court of Appeals were that the person in the Deputy Administrator's position had to know the electoral process and needed administrative experience. 548 A.2d at 627. This is nothing more than saying that the individual had to know the substantive material involved in his or her job and had to have administrative experience consistent with the position. This reasoning applies to any foreman or supervisor. A supervisor must have substantive knowledge of the subject matter of the agency. Further, every

supervisor must have administrative ability and expertise to oversee the staff under him or her. Consequently, every position of state government beyond an entry level can now be exempted under the Court's interpretation of §3(13). Now there is another classification created by the statute, as interpreted by the Court of Appeals. One class is those state employees in positions of supervisor and above who are in the merit system and the other includes those identically experienced and knowledgeable supervisors and above who are exempted. There is no rational or legitimate purpose for this distinction.

This same conclusion that the majority's decision was inconsistent with the legislative purposes and that Billhimer's position applies to most supervisory positions was reached by

Judges Adkins and Cole dissenting from the Court of Appeals Billhimer decision. See Appendix at A-21 to A-23. The dissent found that the position only required,

> ...at best, modest middle management abilities and some understanding of the electoral process and the equipment and forms used in it. The latter knowledge is for the type that may be readily garnered by on-the-job training or simply job experience. If that is all that is demanded by 'expert training and qualifications' then every second or third level manager in State service may be exempted from the classified service, along with others not even at the managerial level. Such a reading of §3(13) is simply not consistent with the legislature's tightly-drawn exclusion from the basic merit system scheme. A reading that requires 'expert training and qualifications,' to include academic requirements and high skills of a professional nature, is consistent with this scheme. This reading implements the legislative goal, rather than frustrating it. ___ Md. _____, 548 A.2d at 830. (Emphasis supplied.) Appendix at A-23 - A-24.

Equal protection may not have been in the express rationale of Judges Adkins and Cole, but the reasoning explains that (1) identically situated public employees can be placed in different classifications of the merit system for no reasonable reason and (2) no legitimate governmental purpose is implemented by the statute as interpreted by the Court of Appeals. As argued in this Petition, any supervisory position (and some non-supervisors according to the dissent) can be placed into the unclassified service at the discretion of the Agency's head or some other government official. This arbitrariness is part of the abuse the merit system was to eliminate. No rational reason or legitimate state purpose need be shown. Employees in identical types of positions may be placed into different categories by virtue of knowing the

substance of the job each performs and having some type of administrative or supervisory duties and skill. This is a compelling reason to grant certiorari to review this case and reinstate the equal protection guaranties under the Maryland merit system statute.

The equal protection clause was not violated until the Court of Appeals imposed its interpretation on the statute. As the statute was interpreted by the trial court exercising appellate review and the Maryland Court of Special Appeals, there was a rational distinction created by the statue reasonably related to the purposes of the statute. A person in a state position that required the training and qualifications of an "expert" in a substantive field is different from a normal, experienced state employee hired for the administrative requirements of

running a state agency. It made sense that a person hired for a special technical ability could be exempted from the merit system of testing and selection. But this does not make sense for administrative positions of supervisor or higher. Had the legislature intended for any state administrative agency position other than the top administrator to be exempted from the merit system, it would have enumerated the exemption in Md. Ann. Code art. 64A §3.

Underscoring the policy that all employees except the top administrator of the administrative agency are to be included in the merit system is a "curative" bill filed in the 1989 Maryland Legislature. House of Delegates Bill No. 617. This proposed legislation appears to be intended to make SABEL a part of the classified service because of the Court of

Appeals decision in the instant case. The Preamble to the bill (Appendix H) states that the 1971 Act creating SABEL should have included the SABEL employees in the classified service "[a]s a matter of sound public policy...." Further, the bill does not exclude the Deputy Administrator nor any other position in SABEL. Unquestionably, there is no suggestion that any position in SABEL requires any training and qualifications equivalent to that of an expert, as required by Md. Ann. Code art. 64A §3(13). The Court should take judicial notice of this proposed legislation as tending to show that there are no rational or legitimate reasons for the classifications created by the Maryland Court of Appeals decision. It logically follows that had the Court affirmed the lower court decisions in favor of Mr. Billhimer, no "curative"

legislation would have been needed since the presumption of all SABEL employees being included in the classified service would have been the necessary extension of the appellate decision.

The valid objectives of the merit system statute were to protect against elected officials hiring and firing employees of the state without proper and appropriate reasons and presumptively place all employees in the classified service. These legitimate interests of the state are promoted by the statute as written and interpreted by the Court of Special Appeals, but not the Court of Appeals of Maryland. At worst, this is an interpretation that promotes distinctions based upon political alliance and affiliations--the practice that the merit system was intended to prevent.

A similar analysis was undertaken by

Justice Blackmun in his concurring opinion in Logan v. Zimmerman Brush Co., 455 U.S. 422, 71 L.Ed.2d 265, 102 S.Ct. 1148 (1982). An Illinois statute barred claims not decided administratively within a certain time period. Although the statute itself created no classifications, the interpretation by the Illinois Court of Appeals upholding the statute was deemed to create two classes of persons who would be affected. The classifications bore no rational relationship to a legitimate governmental interest. On the rational-basis test, there was no reasonable and identifiable governmental objective reasonably advanced. 71 L.Ed.2d at 280. Regardless of the merits of the case, one group would have its claims barred if not decided within the time limit and the other would be able to pursue its claims if a decision was rendered within the time

limit. The concurring opinion concluded that this violated the equal protection guarantee of the Fourteenth Amendment.

In the instant case, the decision of the Maryland Court of Appeals creates two classes of state employees who are identically situated, one of which would be exempted from and the other included in the merit system. The employees have no control concerning the category into which they would be placed. An experienced administrator or supervisor with detailed knowledge about the work the agency performs could be exempted. But until exempted, Md. Ann. Code art. 64A, §1 mandates that they are members of the merit system. Therefore, there will be two groups of employees who arbitrarily would be treated differently even though they are identically situated.

Violation of equal protection arising

out of the distinctions created by a merit system was considered in Canfield v. Sullivan, 774 F.2d 1466 (9th Cir. 1985). Alaska created a merit system which exempted an "executive" in city employment from the merit system. The court examined whether the Personnel Rules were rationally related to furthering a legitimate state interest. The purpose of these laws was to draw a line between particular division heads or executives and the classified employees who work in the agency. 774 F.2d at 1469. The decision of where to draw the line on who constitutes and executive and is exempt is in the province of the Legislature. Id. There being no question that the employee in that case was an executive employee as defined by the statute, he was properly exempted under the distinctions drawn by the Assembly.

The instant case, however, differs from the Canfield case. The Maryland legislature did statutorily exempt the heads of state agencies from the merit system. Md. Ann. Code art. 64A §§(3)(8), (3)(9). But Deputy administrators were not exempted. Other persons with administrative experience and knowledge of the agency's work were not exempted. The Maryland Court of Appeals created an expansion of the statute which invaded the province of the legislature and eroded the lines drawn in the statute. Under the Court's interpretation, there are no lines drawn between executive positions and classified employees. Any supervisory employee can be exempted under the guise of §3(13). There is no rational relationship which furthers a legitimate state interest as the statute has now been interpreted.

This is a matter that the Supreme Court has not encountered heretofore. Although there may be deference to state determinations of distinctions for state purposes, the classes created by statute must be rational and reasonable in accomplishing legitimate state purposes. The state purposes in Maryland are clear and well defined, as set out by the appellate courts. The classifications created by the Maryland Court of Appeals, however, do not accomplish the purposes of the law.

II. AN APPELLANT IS ENTITLED TO HAVE A FINAL DECISION BY THE MAJORITY OF THE NUMBER OF JUDGES DECIDING THE CASE IN APPELLANT'S FAVOR.

Petitioner is in the peculiar position of having won the greater number of judge's votes, but lost the case. This case was decided by the appeal from the

administrative agency to the trial court. The thirteen judges on the Maryland Court of Special Appeals ruled in Petitioner's favor. Two of the seven judges on the Maryland Court of Appeals dissented from the majority opinion. Therefore, five appellate judges have ruled against Petitioner, while sixteen judges have rendered decisions in his favor.

## CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests the Court to issue a Writ of Certiorari to the Court of Appeals of Maryland.

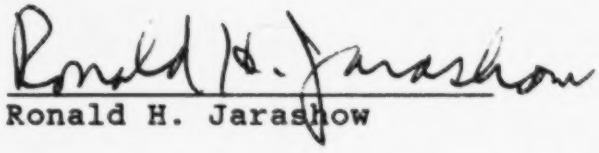
Respectfully submitted this 1 day of March, 1989.

Ronald H. Jarashow

Ronald H. Jarashow

I HEREBY CERTIFY that on this 1 day of March, 1989, 3 copy of the

foregoing Petition for the writ of Certiorari was mailed to the J. Joseph Curran, Jr., Attorney General, Ralph S. Tyler, and Carmen M. Shepard, Assistant Attorneys General, The Munsey Building, 2nd Floor, Seven N. Calvert Street, Baltimore, Maryland 21202.



Ronald H. Jarashow

4Z-h1r

APPENDIX A

COURT OF APPEALS
OF MARYLAND

December 2, 1988

Carmen M. Shepard, Esquire
Attorney General's Office
7 N. Calvert Street
Baltimore, MD 21202

Ronald H. Jarashow, Esquire
Franch & Jarashow, P.A.
111 Cathedral Street
P.O. Box 827
Annapolis, MD 21404-0827

RE: State Administrative Board of Election Laws v. Edwin S. Billhimer, No. 172, Sept. Term, 1987

Dear Counsel:

Please be advised that the motion for reconsideration filed in the above entitled case was denied by the Court on December 2, 1988.

A copy of the mandate is enclosed herewith.

Very truly yours,

Alexander L. Cummings
Clerk

ALC:bmd
Encl.

APPENDIX B

| | |
|---|---|
| STATE ADMINISTRATIVE BOARD OF ELECTION LAWS<br><br>v.<br><br>EDWIN S. BILLHIMER | In the Court of Appeals of Maryland No. 172 September Term, 1987 |

**MANDATE**

TO THE HONORABLE THE JUDGES OF THE COURT OF SPECIAL APPEALS OF MARYLAND:

WHEREAS the case of State Administrative Board of Election Laws v. Edwin S. Billhimer came before you and wherein the judgment of the said Court of Special Appeals was duly entered on the ninth of October, 1987 as appears from the transcript of the record of the said Court of Special Appeals which was brought into the Court of Appeals by virtue of a writ of certiorari dated February 16, 1988; and

WHEREAS in the September Term, 1987 the said cause came on to be heard before the Court of Appeals of Maryland;

ON CONSIDERATION WHEREOF, it was ordered and adjudged on October 21, 1988 by this Court that the judgment be reversed. Case remanded to the Court of Special Appeals with directions to remand the case to the Circuit Court of Anne Arundel County for the entry of judgment affirming the decision of the Secretary of Personnel. Costs to be paid by the appellee.

NOW, THEREFORE, THIS CAUSE IS REMANDED to you in order that such proceedings may be had in the cause in conformity with the judgment of this Court as accord with right and justice, and the Constitution and laws of Maryland, the said writ notwithstanding.

WITNESS The Honorable Robert C. Murphy, Chief Judge of the Court of Appeals of Maryland, this second day of December, 1988.

_____

Clerk
Court of Appeals of Maryland

Costs:

| | |
|---|---|
| Filing fee in Court of Special Appeals | $ 50.00 |
| Petition filing fee | 30.00 |
| Appellant brief | 220.00 |
| Joint record extract | 667.20 |
| Appellant reply brief | 62.40 |
| Appearance fee for appellant | 10.00 |
| Appearance fee for appellee | 10.00 |
| Appellee brief | 158.40 |
| Motion for reconsideration | 25.00 |
| TOTAL COSTS | $1,233.80 |

APPENDIX C

STATE ADMINISTRATION BOARD OF ELECTION LAWS
v.
Edwin S. BILLHIMER.

No. 172, Sept. Term, 1987
Court of Appeals of Maryland.
Oct. 21, 1988.

Former state deputy state election administrator appealed his discharge. The Circuit Court, Anne Arundel County, James C. Cawood, Jr., J., remanded case to Department of Personnel to receive additional evidence. Case returned to Circuit Court which reversed decision. State appealed. The Court of Special Appeals, 72 Md.App. 578, 531 A.2d 1298, affirmed. Certiorari was granted. The Court of Appeals, Murphy, C.J., held that substantial evidence supported decision of Secretary of Personnel that when occupying deputy state election administrator position, employee was "unclassified employee" who could be terminated without cause.

Judgment reversed, and case remanded with directions.

Adkins, J., filed a dissenting opinion in which Cole, J., joined.

**1. Administrative Law and Procedure —791**

In applying substantial evidence test to agency decision, Court of Appeals must not substitute its jugment for expertise of agency for test is a deferential one, requiring restraint and disciplined judicial judgment so as not to interfere with agency's factual conclusions.

**2. Administrative Law and Procedure —789**

Judicial deference applies not only to agency fact-finding but to drawing of inferences from facts as well.

**3. Administrative Law and Procedure —796**

When agency's decision is predicated solely on error of law, no deference is appropriate and reviewing court may substitute its judgment for that of agency.

**4. Administrative Law and Procedure —781**

So long as agency's decision is not predicated solely on error of law, Court of Appeals will not overturn it if reasoning mind could reasonably have reached conclusion reached by agency.

**5. Officers and Public Employees —69.4**

While circuit court's analysis of statute, which enumerated as not within classified service all positions in state boards, commissions, departments and institutions which Secretary of Personnel might determine, with approval of Governor, require medical, engineering, scientific, educational or expert training and qualifications, into four component elements was of considerable aid, it did not compel conclusion that Department of Personnel arbitrator erred in her interpretation and application of statute to deputy state election administrator; arbitrator identified controlling law, stated it accurately, and contravened no canons of statutory construction or expressions of legislative intent in construing law. Code 1957, Art. 64A, § 3(13).

**6. Officers and Public Employees —69.4**

Department of Personnel arbitrator did not incorrectly apply statute defining classified service employees by failing to conclude that deputy state election administrator was a classified employee simply because his position was not specifically exempted from classified service; deputy state election administrator did not achieve his position through competitive examination process, as required by statute, or through compliance with statutory provision. Code 1957, Art. 64A, § 1.

**7. Officers and Public Employees —69.4**

In determining whether deputy state election administrator was a classifed employee, intermediate appellate court was wrong in placing any reliance upon statute which related solely to local boards of supervisors of elections and had no application to employment status of State Administrative Board of Election employees. Code 1957, Art. 64A, § 9G.

**8. Officers and Public Employees —72.63**

Substantial evidence supported Secretary of Personnel's determination that when occupying deputy state election administrator position, employee was "unclassified employee" who could be terminated without cause. Code 1957, At. 64A, § 3(13).

See publication Words and Phrases for other judicial constructions and definitions.

Carmen M. Shepard, Asst. Atty. Gen. (J. Joseph Curran, Jr., Atty. Gen., Ralph S. Tyler, Asst. Atty. Gen., all on brief), Baltimore, for appellant.

Ronald H. Jarashow (William A. Franch, both on brief), Annapolis, for appellee.

Argued before MURPHY, C.J., COLE, RODOWSKY, McAULIFFE, ADKINS, and BLACKWELL, JJ., and CHARLES E. ORTH, Jr., Associate Judge of the Court of Appeals of Maryland (retired) Specially Assigned.

MURPHY, Chief Judge.

This case involves Maryland's Merit System Law, Maryland Code (1988 Repl. Vol.), Article 64A (the Act) and whether, under its provisions, the Deputy Administrator of the State Administrative Board of Election Laws is a classified or unclassified State employment position.[1]

I

The "classified service" is defined in §1 to mean "all offices of profit or trust and all places of employment, whether permanent or temporary, in the service ~~of~~ any State... department, commission, board or institution" other than those in the military forces and those enumerated in § 3. With exceptions not here pertinent, a "classified service employee" is defined in § 1 as a person "who holds under the terms of this article, a position in the classified service."

The enumeration in § 3 of postitions not within the classified service is set forth in seventeen numbered paragraphs; they include, in § 3(13), all positions in State boards, commissions, departments and institutions

> "which the Secretary [of Personnel] may determine, with the approval of the Governor, require medical, engineering, scientific, educational *or expert training and qualifications.*" (Emphasis added.)

Section 4, in twelve numbered paragraphs, delineates additional positions which are not included in the classified ser-

[1] Unless otherwise indicated, all section references are within Art. 64A.

vice. Other express exclusions from the classified service are contained in §§ 6 and 9V(a) of the Act.[2]

Numerous sections in the Act expressly include named positions as within the classified service; some of these sections blanket existing positions and their incumbents into the classified service without competitive examination, based on a specified period of prior service in the position. *See, e.g.*, §§ 5, 7, 8, and 8A.[3]

The Secretary of Personnel is vested with rule-making authority by § 11 in the enforcement of the provisions of the Act. The Secretary is directed by § 15, among other things, to determine the nature of all positions in the State service.

Absent express statutory inclusion as a classified service employee, eligibility for such an employment status depends upon the results of a competitive examination administered by the Secretary. From a "list of eligibles" passing the examination, the selection must be made from those five individuals scoring the highest in the competitive examination. §§ 17, 18, and 22.

Under § 33(d), the Secretary is required to prescribe, by rule, "what may constitute causes for removal" from the State service. A classified employee may be removed from his position only for cause, upon written charges, and an opportunity to be heard in his own defense; a broad right of appeal is provided to the terminated employee. COMAR 06.01.01.47 and .61. An unclassified employee may be terminated at will without a showing of cause and his right of appeal "is limited to the legal and constitutional bases for the termination." COMAR 06.01.01.60 and .62. *See Bender v. Sec., Dep't of Personnel*, 290 Md. 345, 351, 430 A.2d 66 (1981).

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[2] Although not here applicable, we note that ch. 543 of the Acts of 1988 amended the Act in several important particulars. Section 1(6) now defines "classified service" to mean "all positions for which persons are selected on a competitive basis" under the Act's provisions. The term "unclassified service" is defined in § 1(20) to mean "all positions specifically excluded from the classified service" under the Act.

[3] According to the Annual Report of the Secretary of Personnel for the Fiscal Year ended June 30, 1987, 47,580 State employees are within the classified service while 9,457 are unclassified employees of the State.

II

The State Administrative Board of Election Laws (SABEL) was created by ch. 555 of the Acts of 1969, now codified as Code (1986 Repl.Vol.), Art. 33, § 1A-1. It assumed functions previously performed by the Secretary of State, including supervision of the conduct of elections within the State to assure compliance with Maryland's Election Code by the City of Baltimore and County Boards of Supervisors of Elections.[4] Art. 33, § 1A-1(e). The Act creating SABEL provided for a State Administrator of Election Laws, but neither that Act nor any subsequent legislation made provision for the position of Deputy Administrator. No mention was made in the original or in any subsequent legislation whether SABEL's employees were classified or unclassified State employees.[5]

In August 1971, Edwin Billhimer began work at SABEL as State Supervisor of Voting Machines. He did not take a competitive examination for this position, nor was he selected from an "eligible list" of those who had passed such an examination. According to Department of Personnel records Billhimer was given a classification code number of 5421, which indicated that he was an unclassified employee.[6] In January 1972 Billhimer took and passed an examination for the position of Election Chief Clerk in the State classified service. This position did not exist within SABEL; it was available only at local boards of supervisors of elections. Billhimer was never selected for this position and thus never served as Election Chief Clerk.

In late 1977 the position of Deputy State Elections Administrator was created within SABEL and Billhimer was promoted into this position. The Department of Personnel

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[4] The boards of supervisors of elections, whose responsibilities are to "have charge of and make provision for all elections to be held" in their county or city, Art. 33, § 2-9, were created twelve years before SABEL. *See* ch. 739 of the Acts of 1957; Code, Art. 33, § 2-1.

[5] Section 1A-1(d) provides only that SABEL shall "consist of employees provided in the annual State budget from time to time."

[6] Code numbers are used in Department of Personnel records to indicate whether the employee's position is in the classified or unclassified service.

code numbers assigned to the new position indicated that it was unclassified. Billhimer remained SABEL's Deputy Administrator until December 1982. That month he received a letter from SABEL's State Administrator terminating his employment effective December 31, 1982 and advising him that, under the personnel rules applicable to unclassified employees his right of appeal was limited to an inquiry into whether he was discharged for illegal or unconstitutional reasons.

Contending that he was a classified employee, Billhimer appealed his discharge to the Secretary of Personnel. In April 1983 a hearing was held, as authorized by law, before a Department of Personnel arbitrator. By agreement of the parties the sole issue was Billhimer's classified or unclassified status.

To show that Billhimer was an unclassified employee, SABEL introduced into evidence a draft of a 1976 Department of Personnel Report of Survey; it examined the job descriptions of, and staffing pattern for, the nine permanent positions that, in addition to the State Administrator, then existed at SABEL. The report described Billhimer's then position of State Supervisor of Voting Machines as "the technical expert in charge of voter registration, ballot layout and arrangement, and voting machines." The survey team stated in the report that because SABEL lacked a deputy administrator to "take charge of the routine day-to-day decisions in the Administrator's absence and... to assume his responsibilities in the event the Administrator's position is suddenly vacated," a serious weakness existed in SABEL's organizational structure. The survey team urged that a Deputy Administrator position be created at SABEL by augmenting the duties of one of the existing SABEL positions; suggested that the position be filled by someone possessing "either a college degree with considerable administrative experience in the electoral process and proven administrative ability"; and stated that "due to the sensitive nature of such a position, placement in the Unclassified Service is also warranted."

In addition to the draft report, SABEL introduced into evidence letters from, and internal memoranda of, the Depart-

ment of Personnel indicating its support for the creation of the new Deputy Administrator position as unclassified and assigning the position an unclassified code number. Further evidence adduced included documents showing the reclassification of Billhimer's former Supervisor of Voting Machines position into the new Deputy Administrator position and Billhimer's promotion into the new position. Billhimer introduced no evidence beyond the letter notifying him of his termination.

In her Proposal for Decision issued in February 1984, the arbitrator, in five proposed findings of fact, summarized the foregoing evidence presented by SABEL. In her proposed conclusions of law, the arbitrator, after quoting from §§ 1 and 3(13) of the Act, stated: "Clearly, the Deputy Administrator position is one requiring definite and specific expertise." The arbitrator concluded that "Mr. Billhimer never has been and, at the time of his termination was not, a classified employee. At the time of his appointment he accepted the benefits of unclassified status by not having to compete for the position under Merit System procedures. He cannot now, at his termination, rightly claim to protections of the Merit System in seeking to overturn his discharge."

In March 1984 the arbitrator's proposed findings of fact and conclusions of law were adopted by the Director of the Employer-Employee Relations Division. The Director denied Billhimer's request to present two documents that had not been presented at the hearing. Billhimer's case was thereafter set for a hearing and restricted to the legal and constitutional bases for his termination. Prior to the hearing, Billhimer informed the Secretary that he knew of no illegal or unconstitutional bases for the discharge. No hearing, therefore, was held, and in June 1984 the Secretary, accepting the findings of the arbitrator, issued and order separating Billhimer from SABEL effective December 31, 1982.

Billhimer appealed to the Circuit Court for Anne Arundel County and moved for leave to present additional evidence. The court (Cawood, J.) granted the motion, and in May 1985 remanded the case to the Department of Personnel to recieve additional evidence, retaining jurisdiction to decide the

substantive issues after the additional evidence had been obtained. In July 1985 the arbitrator received into evidence from Billhimer a SABEL organization chart and a letter reporting that in January 1972 Billhimer had taken and passed a Department of Personnel examination for the position of Election Chief Clerk. Testifying at this hearing, Billhimer acknowledged that the Election Chief Clerk position existed only at local boards of supervisors of elections and not at SABEL, and that he never held the position; he stated, however, that, as a SABEL employee, on several occasions he worked temporarily at the local boards, performing duties comparable to those of the Chief Election Clerks in those offices.

The arbitrator also received additional evidence from SABEL, *i.e.*, Department of Personnel records showing that at all times during Billhimer's employment at SABEL the code number assigned to his position indicated merit system exemption; a document explaining the meaning of the classification code numbers; a memo from Robin J. Zee, then the Department's Director of Classification and Compensation, pertaining to contact between the Secretary and the Governor's Office with regard to SABEL; and documents showing that SABEL's request for the creation of the Deputy Administrator position was presented to the State Board of Public Works and was approved after discussion.

The Zee memorandum was dated December 3, 1969; it stated

> "Commissioner [Secretary] Bosz contacted the Governor's Office and it is their intention that all positions in this agency should be exempt. It was felt that the legislation creating this agency intended that this be so even though it wasn't specifically stated. Part of the functions for the new agency were formerly performed by the Secretary of State's Office. There is a feeling that this new agency is directly tied to the Executive Department which is exempt from the Merit System. The Governor had promised the new Adminstrator that he could employ any person he desired."

The document from the Board of Public Works was dated December 16, 1977. Then Acting Governor Lee, Comptroller

Goldstein, and Treasurer James were members of the Board at that time. The document stated, in relevant part, that there was an emergency need to approve "the establishment of a new classification of Deputy State Election Administrator" at SABEL; that a Department of Personnel survey of SABEL indicated that "a serious weakness in organizational structure existed without a Deputy Administrator"; and that this position would "allow someone full authority to take charge of routine day-to-day decisions in the Administrator's absence and to assume his responsibilities in the event the Administrator's position is suddenly vacated for any reason." The document further noted that the request had been initiated by the Department of Personnel, had been reviewed by the Department of Budget and Fiscal Planning, and approval was recommended. Prior to approving the new position, the Board members were told that it was not an additional position at SABEL but rather a new classification.

Upon this additional evidence, the arbitrator, in January 1986, found that throughout Billhimer's employment at SABEL his classification code numbers indicated merit system exemption and that the Governor's office in 1969 expressed its intention that all SABEL positions be unclassified. "Nothing presented at the July 1, 1985 hearing," the arbitrator said, "has caused me to alter the conclusions reached in my February 22, 1984 decision."

The case returned to the circuit court. That court held that Billhimer had shown, as a matter of law, that his position had not been exempted from the classified service. In reversing the Secretary, the court reasoned that § 3(13) of the Act required four criteria or elements to establish exemption from the classified service, *i.e.:*

> "1. There must be a State position.
>
> 2. The Secretary of Personnel must determine that the position requires medical, engineering, scientific, educational or expert training and qualifications and should be unclassified.
>
> 3. The Governor must concur in that approval.
>
> 4. There must be at least some indication that such training and qualifications are required; in other words, this cannot be used as a subterfuge to defeat the system."

According to the court, the evidence before the arbitrator failed to establish the second and third elements. The only evidence probative of these elements, the court said, was the Zee memorandum which failed to show that the Secretary ever determined that Billhimer's position required "medical, engineering, scientific, educational or expert training and qualifications," or that the Governor ever approved that determination. The reasons advanced for treating SABEL's employees as unclassified, the court said, did not satisfy § 3(13)'s statutory requirements.

The court also rejected the argument that Billhimer's classification code numbers established that he was in an unclassified position. Quoting *Henslee v. State Personnel Board of Review*, 239 N.E.2d 121, 123, 15 Ohio App.2d 84 (1968), the court stated: "The fact that a position is carried on the auditor's payroll as being in the unclassified service does not establish that classification." Also unconvincing to the circuit court was SABEL's contention that because Billhimer accepted the benefits of unclassified status by not passing a competitive examination for his position, he could not now claim classified status. To accept this argument, according to the trial court, "would mean that the executive branch could place any person in the unclassified service, however illegally or haphazardly, inform them of the same, and then, in effect, deprive them of the benefits of the classified service." The court remanded the case for a hearing on the merits of Billhimer's termination.

SABEL appealed to the Court of Special Appeals, which affirmed the judgment of the circuit court. *State Election Bd. v. Billhimer*, 72 Md.App. 578, 531 A.2d 1298 (1987). The intermediate appellate court, stating that the trial court reversed the agency as a matter of law and not on the basis of the agency's factual findings, held that that court had correctly concluded that the agency misconstrued and misapplied the law. It first noted that the legislature, in 1971, amended both the Act (§ 9G) and the Election Code (Art. 33, § 2-6) "to place all continuously employed permanent employees of the boards of supervisors of elections in the various subdivisions of the State in the State's classified service" under the jurisdiction of the Secretary of Personnel. 72 Md.App. at 584, 531 A.2d

1298. While the intermediate appellate court recognized that these amendments did not explicitly place SABEL employees in the classified service, it said that neither did they "expressly exempt the SABEL staff from the classified service." *Id.* Building upon this premise, the court reasoned that the statutory language of § 1 of the Act was clear and unambiguous, namely, that all employees of the state are deemed classified unless specifically exempted. *Id.* at 586, 531 A.2d 1298. The only specific exemption applicable to SABEL's employees, in the court's view, was that provided by § 3(13) of the Act. According to the court, however, the findings on which the Secretary grounded his decision did not show that either Billhimer's original position or his subsequent Deputy Administrator position had ever been properly exempted in accordance with § 3(13)'s requirements. The survey team draft report was not sufficient to establish any of § 3(13)'s elements, the court stated, because it was not a finding relied upon by the arbitrator and, in any case, it did not explicitly find that the Deputy Administrator position requires "medical, engineering, scientific, educational or expert training and qualifications." *Id.* at 588, 531 A.2d 1298. The intermediate appellate court further found that the Zee memorandum was also deficient as there was no indication in it that the SABEL employees were to be exempted for the reasons required by § 3(13). The court also rejected SABEL's other arguments, in particular, its contention that Billhimer's personnel classification code numbers proved his unclassified status. This finding, it said, rested on a spurious theory of "bureaucratic osmosis, i.e., a gradual absorption into an unclassified status by virtue of misidentification." *Id.* at 591, 531 A.2d 1298. We granted certiorari to consider the significant issue raised in the case.

## III

The standard and scope of review of the Secretary's decision is set forth in the Maryland Administrative Procedure Act, Code (1984) § 10-215 of the State Government Article. Subsection (g)(3) provides that a reviewing court may

> "reverse or modify the decision [of the agency] if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision of the agency:
>
> (i) is unconstitutional;

(ii) exceeds the statutory authority or jurisdiction of the agency;

(iii) results from an unlawful procedure;

(iv) is affected by any other error of law;

(v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or

(vi) is arbitrary or capricious."

[1-4] In determining whether an agency's decision is supported by substantial evidence, we are mindful that substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a concluson." *Supervisor v. Group Health Ass'n*, 308 Md. 151, 159, 517 A.2d 1076 (1986); *Bulluck v. Pelham Woods Apartments*, 283 Md. 505, 512-13, 390 A.2d 1119 (1978); *Snowden v. Mayor & C.C. of Balto.*, 224 Md. 443, 448, 168 A.2d 390 (1961). In applying the substantial evidence test, we must not substitute our judgment for the expertise of the agency, *Supervisor of Assessments of Montgomery County v. Asbury Methodist Home, Inc.*, 313 Md. 614, 547 A.2d 190 (1988); *Motor Vehicle Admin. v. Lindsay*, 309 Md. 557, 564, 525 A.2d 1051 (1987); *Group Health Ass'n, supra*, 308 Md. at 159, 517 A.2d 1076; *Bernstein v. Real Estate Comm.*, 221 Md. 221, 230, 156 A.2d 657 (1959), *appeal dismissed*, 363 U.S. 419, 80S.Ct. 1257, 4 L.Ed.2d 1515 (1960), for the test is a deferential one, requiring "restrained and disciplined judicial judgment so as not to interfere with the agency's factual conclusions," *Asbury Methodist, supra*, 313 Md. at 625, 547 A.2d 190; *Insurance Comm'r v. Nat'l Bureau*, 248 Md. 292, 309-310, 236 A.2d 282 (1967). This deference applies not only to agency fact-finding, but to the drawing of inferences from the fact as well. *St. Leonard Shores Joint Ven. v. Supervisor*, 307 Md. 441, 447, 514 A.2d 1215 (1986); *Bulluck, supra*, 283 Md. at 513, 390 A.2d 1119; *Snowden, supra*, 224 Md. at 448, 168 A.2d 390. When, however, the agency's decision is predicated solely on an error of law, no deference is appropriate and the reviewing court may substitute its judgment for that of the agency. *Washington Nat'l Arena v. Comptroller*, 308 Md. 370, 378-79, 519 A.2d 1277 (1987); *Ramsay, Scarlett & Co. v. Comptroller*, 302 Md. 825, 490 A.2d 1296 (1985). In brief, so long as the agency's decision is not predicated solely on an error of law, we will not overturn it if a reasoning mind could reasonably have reached the conclusion reached by the agency.

(A)

[5] We do not share the view of the circuit court and Court of Special Appeals that the arbitrator misconstrued and misapplied the law. As the arbitrator correctly stated, the law controlling this case is contained in §§ 1 and 3(13) of Article 64A. While the circuit court's analysis of § 3(13) into four component elements is of considerable aid, it does not compel the conclusion that the arbitrator erred in her interpretation and application of that section. Indeed, the arbitrator identified the controlling law, stated it accurately, and contravened no canons of statutory construction or expressions of legislative intent in construing it.

[6, 7] Nor do we think that the arbitrator incorrectly applied the provision of § 1 of the Act by failing to conclude, in the circumstances of this case (as did the Court of Special Appeals), that Billhimer was a classified employee simply because his position was not specifically exempted from the classified service. A "classified service employee," as we earlier observed, is defined in § 1 of the Act as a person "who holds [a classified position] under the terms of this article." That Billhimer did not achieve his position through the competitive examination process, as required by the Act's terms, or through compliance with a statutory provision, is clear from the record. Thus, to determine as a matter of law that Billhimer was a classified employee totally ignores the uncontradicted evidence that he never qualified for this status "under the terms of this article." Moreover, the intermediate appellate court was wrong in placing any reliance upon the provisions of § 9G of the Act; that statute relates solely to the local boards of supervisors of elections and has no application to the employment status of SABEL employees.

We thus find that no error of law affected the Secretary's decision.

(B)

[8] In determining whether the Secretary's decision was supported by substantial evidence, it is well to distinguish two issues that have become somewhat intertwined in the treatment accorded them below. The first is whether Billhimer

occupied an unclassified position when he began work for SABEL in 1971 as State Supervisor of Voting Machines. The second is whether the position Billhimer occupied from 1978 to 1982 as Deputy Administrator was unclassified. The second issue is, of course, the decisive one. We think there was substantial evidence to support the Secretary's determination that when occupying the Deputy Administrator position Billhimer was an unclassified employee.

The four elements required for exemption by § 3(13), as the circuit court correctly stated, are: the existence of a State position; the Secretary's determination that the position requires medical, engineering, scientific, educational, or expert training and qualifications; the Governor's approval of the Secretary's determination; and a showing, applicable here, that the position is one requiring "expert training and qualifications."

The first element is not at issue. The fourth element was adequately established, we think, by the draft survey report and the December 1981 questionnaire describing the Deputy Administrator's duties. Both of these documents indicated that the Deputy Administrator's responsibilities required a broad knowledge of the electoral process, as well as the expertise needed to assume the functions of the Administrator, if necessary. This was substantially equivalent to stating that the position required expert training and qualifications within the contemplation of § 3(13).

The second element was established by the evidence showing that the Secretary, in recommending the creation of the Deputy Administrator position, adopted the findings of the Department's survey report. Evidence probative here included a November 1977 letter from the Department's Supervising Analyst to the then Secretary of the Department of Budget and Fiscal Planning, confirming the Secretary's support for the Deputy Administrator position, and stating that the "recommendation was made in our survey conducted in 1976." This letter, considered together with other documents showing that the Secretary directed that the Deputy Administrator position carry an unclassified personnel code number, supports the inference that the Secretary adopted the draft report's findings that the position required expert training and expertise.

As to the third element, whether the Governor approved the Secretary's determination, SABEL introduced into evidence a document showing that the Deputy Administrator position was approved by the Governor while acting as a member of the Board of Public Works.[7] The transcript accompanying this document does not indicate that the Governor expressly recognized that the Deputy Administrator position was one which required expert training and qualifications. Nevertheless, an inference can be drawn that the Governor was aware of the nature of the Deputy Administrator position, the Department of Personnel's recommendations concerning it, and the history of SABEL employees' unclassified status. This evidence, although not strong, is not so insubstantial as to warrant overturning the agency's decision, given the presumption of correctness with which agency decisions reach a reviewing court. *See Bulluck v. Pelham Woods Apartments, supra*, 283 Md. at 513, 390 A.2d 1119. In this regard, we are mindful that the heart of the fact-finding process often is the drawing of inferences from the facts. That function is committed to the agency, and the court may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported. The test is reasonableness, not rightness. *Bulluck, supra*, 283 Md. at 515-16, 390 A.2d 1119, quoting *Snowden v. Mayor & C.C. of Balto.*, 224 Md. 443, 448, 168 A.2d 390 (1961).

In determining whether there was substantial evidence to support the agency's decision, we consider, in addition to evidence of compliance with § 3(13), other probative evidence on the record relied upon by the Secretary to support his decision. This includes the evidence showing that since its inception all SABEL employees, with the Governor's approval, have been in the unclassified service and that the Secretary's personnel codes have consistently identified these employees as unclassified. Coupled with this evidence, we consider as well the affirmative showing in this case that Billhimer did not

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[7] Code (1980 Repl.Vol.), Art. 78A, § 16B requires approval by the Board of Public Works of any permanent position sought to be created in excess of those included in the budget.

satisfy the Act's requirements for classified service status. Viewing the evidence in a light most favorable to the agency, as we must do, we conclude that the Court of Special Appeals erred in overturning the Secretary's decision.

JUDGMENT REVERSED; CASE REMANDED TO THE COURT OF SPECIAL APPEALS WITH DIRECTIONS TO REMAND THE CASE TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY FOR THE ENTRY OF JUDGMENT AFFIRMING THE DECISION OF THE SECRETARY OF PERSONNEL; COSTS TO BE PAID BY THE APPELLEE.

ADKINS, Judge, dissenting, in which COLE, J., joins.

Edwin Billhimer (Billhimer) once was the deputy administrator of the State Administrative Board of Election Laws (SABEL). In 1982 he was separated from that position, pursuant to procedures applicable to State employees in the unclassified service. His claim to the protection of procedures available to those in the classified service or merit system was rejected by the Department of Personnel. The Circuit Court for Anne Arundel County (Cawood, J.) and the Court of Special Appeals, *State Administrative Bd. of Election Laws v. Billhimer*, 72 Md.App. 578, 531 A.2d 1298 (1987), saw it otherwise. A majority of this Court now holds that Billhimer was indeed in the unclassified service. Because the majority, in reaching its conclusion, has failed to construe the statutes here involved in a manner consistent with the legislative goals sought by those statutes, I respectfully dissent.

By Ch. 41, Acts of 1920, the General Assembly added to the Annotated Code Article 64A, entitled "Merit System." In so doing, Maryland became the tenth state to enact a merit system law. *See* O. Stahl, *Public Personnel Administration*, 33 (6th ed. 1971). This State was, therefore, in the forefront of the movement to bring about more efficient state government and, what is more important, to try to exclude from government service aspects of corruption and political patronage that had so concerned reformers of the late nineteenth and

early twentieth centuries. *See* R. Vaughn, *Principles of Civil Service Law*, §1.2 (1976). As the Court of Special Appeals has recognized, "[o]ne of [the] purposes [of Article 64A] is to provide standards of employment and advancement through testing, etc., intending to avoid problems inherent in political spoils systems such as nepotism and related abuses." *Sec., Dep't of Personnel v. Bender*, 44 Md.App. 714, 715, 411 A.2d 107, 108 (1980), *aff'd and rem'd*, 290 Md. 345, 430 A.2d 66 (1981).[1]

Cynics or pragmatists may argue that one cannot take the politics (*i.e.*, patronage) out of politics and that Governors and others who occupy the seats of power will find methods of achieving what they wish despite merit system laws. It may be that laws of this sort are subject to evasion, avoidance, and misadministration. But a court should not countenance efforts of those kinds when a proper construction of the law will tend to prevent them. Our task is to effectuate the legislative goal embodied in the statute. *Kaczorowski v. City of Baltimore*, 309 Md. 505, 513-515, 525 A.2d 628, 632-633 (1987).

Article 64A, § 1,[2] places within the classified service (the merit system) essentially all State positions, other than those in the military and those expressly exempted by specific statutory provision. This statement of almost total preference for the classified service demonstrates the powerful thrust of Article 64A as remedial legislation that must be liberally construed to implement its purpose. *E.g., Neal v. Fisher*, 312 Md. 685, 693-694, 541 A.2d 1314, 1318-1319 (1988); *Carolina Freight Carriers v. Keane*, 311 Md. 335, 339, 534 A.2d 1337, 1338 (1988); *Culotta v. Raimondi*, 251 Md. 384, 387, 247 A.2d 519, 521 (1968.). By the same token exemptions from remedial

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[1] "The merit system plank was the chief pledge of the Democratic party's platform" in the 1919 campaign, and there was considerable pressure on Governor Ritchie's administration to assure the enactment of a broad and "efficient merit system applicable to the offices of the State government." Editorial, Baltimore Sun, Feb. 25, 1920, at 10, col. 1.

[2] Unless otherwise noted, all section references are to sections of Article 64A. And the sections are taken as they stood at the times relevant to this case.

legislation must be narrowly construed. 3 C. Sands, Sutherland's Statues and Statutory Construction § 60.01 (4th ed. rev. 1986); *see Saunders v. Unemployment Compensaton Board*, 188 Md. 677, 683, 53 A.2d 579, 581 (1947) (this Court, in general, agreed with the rule that "exclusions in remedial statutes should be strictly construed"; the Court, however, did not apply the rule in that case).

The exemption before the Court in this case is § 3(13). It excludes from the classified service "[a]ll positions in State offices, boards, commissions, departments and institutions, which the Secretary [of Personnel] may determine, with the approval of the Governor, require medical, engineering, scientific, educational or expert training and qualifications." The trial court and the Court of Special Appeals viewed and the majority views this provision as requiring four elements for exemption:

> [1] the existence of a State position; [2] the Secretary's determination that the position requires medical, engineering, scientific, educational or expert training and qualifications; [3] the Governor's approval of the Secretary's determination; and [4] a showing, applicable here, that the position is one requiring 'expert training and qualifications.'

314 Md. at 60, 548 A.2d at 826, 827. I agree with this analysis of the statute, but cannot agree that it was complied with here. I believe that at the agency level this statute was misconstrued—a misconstruction also adopted by the majority. Because, however, the agency decision was predicated on an error of law, "no deference is appropriate and the reviewing court may substitute its judgment for that of the agency." *Id.* at 59, 548 A.2d at 826; *Washington Nat'l Arena v. Comptroller*, 308 Md. 370, 378-379, 519 A.2d 1277, 1281 (1987).

In a cursory manner, the majority concludes that the "expert training and qualifications" factor of § 3(13) was met because Deputy Administrator Billhimer's "responsibilities required a broad knowledge of the electoral process, as well as the expertise needed to assume the functions of the Administrator." 314 Md. at 61, 548 A.2d at 827. The need for expertise is said to be demonstrated in a draft survey report

prepared by the Department of Personnel, and by a December 1981 questionnaire describing the deputy administrator's duties.

The 1976 draft report reviews job descriptions and staffing patterns as they then existed at SABEL—a staff which contained but five full-time positions. As to Billhimer's then position, the report says it "serves as the technical expert in charge of voter registration, ballot layout and arrangement, and voting machines...." The report also identifies the need for a deputy administrator who could "take charge of the routine day-to-day decisions in the Administrator's absence and the ability to assume his responsibilities in the event the Administrator's position is suddenly vacated for any reason...." The report's authors suggest that the deputy administrator's position "be filled by someone who possesses either a college degree with considerable administrative experience or someone with considerable experience in the electoral process and proven administrative ability." Because of "the sensitive nature of the position," and not because of any purportedly necessary expertise, the authors conclude that "placement in the unclassified service is also warranted."

The 1981 document, a position questionaire prepared by Billhimer, lists the deputy's duties as

> to assist in all phases of the election process that are the statutory duties of the Administrator and of SABEL. In addition, the Deputy assumes full authority for the day to day operations and policy decisions in the Administrator's absence and assumes temporarily the responsibilities if that position is suddenly vacated for any reason.

Other duties listed include such matters as "[s]upervise the collection and tabulation of voter statistics," "maintain inventory of all voting equipment used by local boards," "[s]upply applicants with voter lists," "[p]repare... ballot ... form and layouts for each local board," "[m]aintain a general overview of all office operations," and "[s]erve as office parking coordinator." The "expertise" revealed by these documents is not the sort of "expert training and knowledge" demanded by § 3(13).

I again emphasize that § 3(13) is a narrow exception to the fundamental principle of inclusion of position within the

classified service.[3] The specific sorts of expertise it identifies are "medical, engineering, scientific, [and] educational..." No one contends that Billhimer possesses any particular expertise in any of these areas. But the specification of these fields sheds light on the meaning of "expert training and qualifications." Each of the specified areas is likely to involve not only a high degree of professional skill, but also substantial, degree-level academic qualifications. Persons possessing these qualifications, the legislature may well have thought, need not have their proficiency determined by competitive examination. Moreover, professionalism and ethical standards related to these fields lessen other concerns addressed by a merit system. *See* Vaughn, § 3.2 for examples of types of positions typically excluded from the examination requirement. It is "expert training and qualifications" of this sort to which § 3(13) refers.

It must be so, because the construction adopted by the majority is wholly inconsistent with the legislative goal of Article 64A. As a factual matter, the record shows that Billhimer's position demanded, at best, modest middle management abilities and some understanding of the electoral process and the equipment and forms used in it. The latter knowledge is of the type that may be readily garnered by on-the-job training or simply job experience. If that is all that is demanded by "expert training and qualifications" then every second or third level manager in State service may be exempted from the classified service, along with others not even at the managerial level. Such a reading of § 3(13) is simply not consistent with the legislature's tightly-drawn exclusion from its basic merit system scheme. A reading that requires "expert training and qualifications," to include academic requirements and high skills of a professional nature, is consistent with this scheme.[4] This reading implements the

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[3] Indeed, the very provision that is now § 3(13) was criticized as being too broad an exemption. The Ritchie administration defended against this attack by arguing that the exemption was in reality a narrow one, since the positions mentioned in the section were included in the merit system unless excluded by the Governor pursuant to the section's provisions. Baltimore Sun, March 3, 1920, at 7, col. 2.

[4] Although canons of statutory construction should not be applied in a mechanical or mindless fashion, *NCR Corp. v. Comptroller*, 313

legislative goal, rather than frustrating it. *NCR Corp. v. Comptroller*, 313 Md. 118, 146, 544 A.2d 764, 767 (1988).

I do not believe there is substantial evidence in this record to support the agency finding that the Secretary of Personnel determined that the deputy administrator position fell within the requirements of § 3(13). The purported evidence in this regard is a 1977 letter from the Department of Personnel to the Secretary of Budget and Fiscal Planning advising that a recommendation that the position be unclassified was contained in the 1976 report. There was such a recommendation in that report, but it was not based on any § 3(13) findings. That statute was not even mentioned in the report. As we have seen, the recommendation was based on the notion that the position was "sensitive." That is totally irrelevant to § 3(13). Nor do I think that the Governor's unexplained vote at the 16 December 1977 Board of Public Works meeting demonstrates that he approved the position as being within the requirements of § 3(13).[5] It is all very well to speak of inferences, as the majority does, 314 Md. at 59, 548 A.2d at 826. But surely, exclusion from the legislatively established merit system, pursuant to a narrow exemption provision, requires the dotting of a few more "i's" and the crossing of a few more

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Md. 118, 145, 544 A.2d 764, 777 (1988), "[t]o a considerable extent, they are founded on both logic and common sense... [and] properly used, they afford an opportunity for principled decision making...." *Kaczorowski v. City of Baltimore*, 309 Md. 505, 512, 525 A.2d 628, 631 (1987). In this case, the rule of *ejusdem generis* supports the construction I give to the statute; it advances rather than frustrates the purpose of the statute. *Culotta v. Raimondi*, 251 Md. 384, 387, 247 A.2d 519, 521 (1968). I apply to the general phrase "expert qualifications and training" the same meaning contained in the particular items "medical, engineering, scientific, educational...." *See State v. 149 Slot Machines*, 310 Md. 356, 363-364, 529 A.2d 817, 820-821 (1987). It is as though the statute read "medical, engineering, scientific, educational or similar expert training and qualifications."

[5] The Board of Public Works agenda for that meeting sets up the matter as involving no more than an emergency amendment to the pay plan, requiring approval of the Board pursuant to Art. 64A, § 27(a). Neither the agenda nor the relevant portion of the transcript of the Board meeting contains any hint that the agenda item dealt with creation of the unclassified position pursuant to § 3(13).

"t's" than we have here. I suggest we are dealing with rank speculation, not rational inferences.[6]

None of that really matters, however, if, as I contend, § 3(13) simply does not permit the deputy administrator provision to be exempted from the merit system. Even had the Secretary of Personnel unequivocally found (on the facts in this record) the position to be within § 3(13) and had recommended exemption, even had the Governor unquestionably approved the recommendation, it would make no difference. As a matter of law, this position was not one that met the strict exemption requirements of § 3(13).

Nor can it matter that the Department of Personnel coded the position as an unclassified one. Article 64A does not permit the department to remove an employee from the classified service by attaching a code number to his or her position; so far as this case is concerned, that could be done, if at all, via § 3(13), a provision not applicable to the deputy administrator slot as a matter of law. Like the Court of Special Appeals, I reject the State's "theory of bureaucratic osmosis...." *State Election Bd. v. Billhimer*, 72 Md.App. 578, 591, 531 A.2d 1298, 1304 (1987).

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[6] The absence of any real sort of administrative paper trail to substantiate the State's position is, perhaps, explained by a 3 December 1969 memo to the file from Robin Zee, then director of the Division of Classification and Compensation in the Department of Personnel. Regarding SABEL, Zee wrote:

> Commissioner [later Secretary of Personnel] Bosz contacted the Governor's Office and it is their intention that all positions in this agency [SABEL] should be exempt.... There is a feeling that this new agency is directly tied to the Executive Department which is exempt from the Merit System. The Governor had promised the new Administrator that he could employ any person he desired.

That an agency designed to assure compliance with the election laws should be the last to be exempt from the merit system is a proposition that need not now be debated. *See*, however, Ch. 351, Acts of 1971, placing most permanent employees of local boards of supervisors of elections in the merit system. What is at least arguable from this memo is that SABEL positions were exempted because the Governor's Office wanted it that way and because the Governor had given the new administrator leave to hire by way of patronage. Obviously, this approach to exemption is the antithesis of the merit system and is not a basis for exemption warranted by § 3(13).

So Billhimer cannot have been in the unclassified service. Where, then, was he? The majority, with some force, says he could not have been in the classified service either, because he had taken no examination and was not placed there pursuant to any statute, 314 Md. at 69, 548 A.2d at 826. Nevertheless, I believe the majority incorrectly concludes that he did not "hold a classified position under the terms of this article." Art. 64A, § 1.

It is true that Billhimer did not meet the ordinary prerequisites for entry into the classified service. But § 1, in effect, presumes that every position not exempted is in the classified service. " 'The classified service' means and includes all offices of profit or trust and all places of employment, whether permanent or temporary, other than those in the military forces, and other than those enumerated in § 3 of this article" (or some other express statutory exemption). That presumption is consistent with the legislative decision that inclusion in the classified service or the merit system is the overarching rule whereas exemption is the relatively rare exception. *See* n. 3, *supra*, and accompanying text. When a position falls through the cracks, thanks, perhaps, to inept work at the Department of Personnel, the legislature has decided, as a matter of policy, that the position is in the classified service.

I would affirm the decision of the Court of Special Appeals.

Judge COLE has authorized me to say that he joins in this dissenting opinion.

APPENDIX D

STATE ADMINISTRATIVE BOARD OF ELECTION LAWS

v.

EDWIN S. BILLHIMER
No. 131, Sept. Term, 1987.

Court of Special Appeals of Maryland.
Oct. 9, 1987

Former deputy state election administrator brought action seeking determination that he was classified employee and could not be terminated without cause. The Circuit Court, Anne Arundel County, James C. Cawood, J., entered judgment for deputy and state appealed. The Court of Special Appeals, Gilbert, C.J., held that deputy state election administrator was classified, not unclassified, employee, entitled to protections of merit system law.

Affirmed.

**1. States**

While classified employees within meaning of State Merit System may only be removed for cause, and have right to challenge sufficiency of cause, unclassified employees are not subject to Merit System, they need not submit to qualifying examinations or compete with other listed candidates, but may be removed at will unless termination is illegal or unconstitutional, Code 1957, Art. 33, § 1A-1; Art. 64A, §§ 18, 22, 33.

**2. Administrative Law and Procedure**

Error of law is statutorily prescribed basis for reversing decision of administrative agency.

**3. Administrative Law and Procedure**

In contrast to factual findings, no deference is accorded to agency's legal conclusions once reviewing court determines them to be erroneous.

**4. Administrative Law and Procedure**

Role of Court of Special Appeals in reviewing adminstrative decision is not to directly review judgment of circuit court, but consider whether there was substantial evidence before agency on record as a whole to support its conclusions.

**5. Officers and Public Employees**

Under state merit system law all employees of state are deemed classified unless they have been specifically exempted from category. Code 1957, Art. 64A, § 1 et seq.

**6. Officers and Public Employees**

Position of deputy state election administrator did not require expert training or qualification so as to exempt deputy from classified employement under state merit system law; rather position of deputy state election administrator was classified position. Code 1957, Art. 64A, §§ 1 et seq., 3, 3(13).

**7. Administrative Law and Procedure**

Administrative agencies must provide reasons for their decisions.

**8. Officers and Public Employees**

Even if discharged deputy state election administrator knew that he was "coded" as unclassified employee rather than classified employee such misidentification did not change deputy's classified status into unclassified status. Code 1957, Art. 64A, § 1 et seq.

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Carmen M. Shepard, Asst. Atty. Gen. (J. Joseph Curran, Jr., Atty. Gen., on the brief), Baltimore, for appellant.

Ronald H. Jarashow (William A. Franch, on the brief), Annapolis, for appellee.

Argued before GILBERT, C.J., and BLOOM and ROSALYN B. BELL, JJ.

GILBERT, Chief Judge.

Andrew Jackson, the seventh President of the United States, is quoted as having said:

> "The duties of all public offices are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance, and I cannot-but believe that more is lost by a long continuance in office than is generally gained by their experience."[1]

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[1] Prof. Fremont P. Wirth, *The Development of America* (1941 Ed.), pp. 276-77.

With that statement President Jackson justified his philosophy of "to the victor belong the spoils."[2] This appeal tests whether the position of Deputy State Election Administrator is part of the "spoils" of election. Phrased less bluntly: Is the office of the Deputy State Election Administrator a classified or non-classified position?

*The Facts*

Edwin Billhimer was employed by the State Administrative Board of Election Laws (SABEL) on August 11, 1971. His position at that time was "unclassified." Approximately five months later, January 15, 1972, he took an examination for the position of "Chief Clerk," a job that would qualify him for State merit system status.[3] Billhimer received a "qualifying" rating as a result of the examination, but he was not placed on an eligibility list, a point repeatedly stressed by the State in its brief.[4]

Six years later, February 8, 1978, Mr. Billhimer was promoted from the position of "Supervisor of Voting Machines" to "Deputy Administrator." The Deputy Administrator's position was intended to be a new title, rather than a new job.[5] The creation of the title was the result of a survey conducted by the Maryland State Department of Personnel at the request of the Administrator of SABEL. In its *draft proposal* the survey team recommended the designation of one of the existing positions

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[2] William Learned Marcy (1786–1857), Governor of New York speech in the United States Senate in 1837. The full quote is: "They see nothing wrong in the rule that to the victor belong the spoils of the enemy."

[3] Billhimer tesitfied that the examination was administered in order to comply with a new law. The requirements of Md.Ann.Code art. 64A, § 9G coincide with the date of his examination.

[4] The point is immaterial if the examination was in fact taken in order to comply with the then new § 9G of art. 64A. The record before us does not lend itself to any other logical explanation for the administration of the examination. Under § 9G, "any incumbent employee who passes the examination shall be retained in his position." The eligibility list requirement was expressly stricken from the proposed legislation. *See* 1971 Maryland Laws, Ch. 351. *See also* Md. Senate Journals, 1971, at 2035.

[5] The State relies heavily on the fact that Billhimer was not subjected to a new examination or competition. Neither, however, is necesssarily required under the Department of Personnel rules. *See D'Anna v. Secretary of Personnel*, 47 Md.App. 180, 422 A.2d 50 (1980).

as "Deputy Administrator," so as to remedy what the team believed was a serious weakness in the organizational structure of SABEL. The survey team opined that there was a need for someone with the authority to take charge of the routine day-to-day decisions in the administrator's absence. The draft report specifically stated that because of "the sensitive nature of such a position placement in the unclassified service is also warranted." When Billhimer was designated as the Deputy Administrator, he was assigned an unclassified position code number.[6]

On December 10, 1982, SABEL, through its then Administrator, mailed Billhimer a letter terminating him as Deputy Administrator of SABEL, effective as of December 31, 1982. No reason for the termination was stated in the letter. Billhimer was, however, notified of his right to appeal pursuant to Personnel C.O.M.A.R. 06.01.01.60. An appeal under that particular rule is limited to an inquiry into whether illegal or unconstitutional reasons exist for the termination of employment.

Billhimer asserted that he was a classfied employee and could not be terminated without cause. He appealed to the Secretary of Personnel. That agency sustained the Administrator's position. Eventually, after exhausting his administrative appeal, Billhimer sought redress in the Circuit Court for Anne Arundel County. Judge James C. Cawood remanded the matter to the Secretary of Personnel for further proceedings. At the conclusion of those proceedings, Billhimer again sought judicial review. After a hearing, Judge Cawood reversed the decision of the Department of Personnel. The effect of that decision is to continue Billhimer as a state employee.

Aggrieved by Judge Cawood's decision, the State has appealed. It initially presented us with two issues, namely:

> "1. Whether the determination of the Department of Personnel that the former Deputy Administrator for the State Election Board was properly terminated as an

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[6] A "code number" indicates title and classification.

unclassified employee is supported by substantial evidence?

2. Whether the court below erred in substituting its judgment for the judgment of the agency?"

In its reply brief the State raised an additional issue:

"3. Whether appellee should benefit from his delay in challenging his employment status?"

*The Law*

The resolution of this case requires an understanding of the State Merit System. Little would be gained from referring to "classified" or "unclassified" employees unless we first define and explain the terms. Therefore, we shall briefly sketch the State Merit System.

A "classified service position" is "any office or place of employment in the classified service." Md.Ann.Code, art. 64A, § 1 (1957). The "classified service" includes "*all* offices of profit or trust and all places of employment, whether permanent or temporary, in the service of any State officer, department, commission, *board*, or institution, other than those in the military forces, and *other than those enumerated in § 3* of this article." *Id.* (emphasis added).

That section, in pertinent part, provides an exemption from classified service for

> "[a]ll positions in State offices, boards, departments and institutions which the Secretary [of Personnel] may determine, with the approval of the Governor, require medical, engineering, scientific, educational or expert training and qualifications."

**Section 3(13).**

[1] To qualify for a classified position, a candidate must pass an examination, Md. Ann.Code art. 64A, § 18, be included in a list of persons eligible for appointment, and compete with the others on the list for the purpose of filling any vacancy. *Id.* at § 22. A classified employee may be removed only for cause,

and the employee has a right to challenge the sufficiency of the cause. *Id.* at § 33.

Unclassified employees, on the other hand, are not subject to the merit system. They need not submit to qualifying examinations, nor need they compete with other listed candidates. They may, however, be removed "at will" unless the termination is illegal or unconstitutional. C.O.M.A.R. 06.01.01.60A

SABEL is charged specifically with supervising election practices throughout the state. *County Council v. Montgomery Ass'n*, 274 Md. 52, 333 A.2d 596 (1975). It was created by 1969 Md.Laws, Ch. 555. That chapter added § 1A-1 to Md.Ann.Code art. 33, the State Election Code.

One of the avowed purposes of § 1A-1 was to create the office of State Administrator of Election Laws and to spell out his "powers, ... duties, ... tenure, salary, and office staff." Notwithstanding the avowed purposes, there is no reference in the body of the statute itself to the Administrator's "office staff." Indeed, the only reference whatsoever to "office" is found in Md.Ann.Code art. 33, § 1A-1(d) which provides: "The office [of the Administrator] shall be located in Annapolis and shall consist of employees at salaries provided in the annual State budget from time to time." The statute is silent with respect to exemption of the employees from the classified service.

In 1971 the Legislature amended both the Merit System Law and the Election Code. The purpose of the amendments was to place all continuously employed permanent employees of the boards of supervisors of elections in the various subdivisions of the State in the State's classified service and, therefore, under the jurisdiction of the Secretary of Personnel. *See* Md.Ann.Code art. 64A, § 9G and art. 33, § 2-6.

The 1971 amendment did not explicitly place SABEL employees under the classified service. It did, however, embrace within the classified system all employees of the local political subdivisions' boards of supervisors of elections, except those that specifically opted to remain in a local merit system. In any event, the Legislature did not expressly

exempt the SABEL staff from the classified service or from the jurisdiction of the Department of Personnel.

The State argues that the circuit court ran afoul of the rule that a review court may not substitute its judgment for that of the Department of Personnel, if the agency's decision was supported by substantial evidence. A review of the record before us reveals that Judge Cawood reversed the agency as a "matter of law" and not on the basis of the agency's factual findings. The judge held that the agency misconstrued and misapplied the law.

> "Under, or apart from statutes, a standard of review is whether the administrative agency has acted in accordance with, or contrary to, the law. The reviewing court may correct an administrative action where the agency has either violated, misconceived, improperly construed, or failed to follow, the law. The court may also interfere where the agency has proceeded on an erroneous theory of law, or has otherwise applied the law incorrectly or committed an error of law."

73A C.J.S. *Public Administrative Law and Procedure* § 242 (1983) (footnotes omitted).

Judge Cawood found that the conclusion reached by the agency was not supported by evidence demonstrating that the statutory criteria for exemption from classified service had been satisfied.

Under the Administrative Procedure Act, Md.State Gov't Code Ann. § 10-215(g)(3), a circuit court may:

> "reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision of the agency:
>
> (i) is unconstitutional;
>
> (ii) exceeds the statutory authority or jurisdiction of the agency;
>
> (iii) results from an unlawful procedure;
>
> (iv) is affected by any other error of law;
>
> (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
>
> (vi) is arbitrary or capricious."

[2] Indubitably, an error of law is a statutorily prescribed basis for reversing a decision of an administrative agency.

[3] Recently this Court reiterated that the proper standard of review of agency action is that the administrative decision will not be disturbed on appeal if substantial evidence supports the factual findings and no error of law exists. *Howard County v. Davidsonville Area Civic Ass'n, Inc.*, 72 Md.App. 19, 527 A.2d 772 (1987). In contrast to factual findings, no deference is accorded to an agency's legal conclusions once a reviewing court determines them to be erroneous. *United Parcel Service v. Comptroller*, 69 Md.App. 458, 518 A.2d 164 (1986). *See generally* 73A C.J.S. Public Administration Law and Procedure § 242 (1983). We must now determine whether the hearing judge was correct in his ruling that the agency misconstrued and misapplied the law.

[4] The role of this Court, as stated in *Public Serv. Comm'n v. Balto. Gas & El.*, 273 Md. 357, 329 A.2d 691 (1974), is essentially to repeat the task performed by the circuit court. "We do not, therefore, in considering the legality and reasonableness of the ... [agency's] decision ..., accord prima facie correctness to the decree of the [circuit] court...." *Id.* In short, we do not directly review the judgment of the circuit court, but "consider whether there was substantial evidence before the ... [agency] on the record as a whole to support its ... [conclusions]." *Id.* at 362, 329 A.2d 691.

The crux of this case is statutory construction. "When engaged in ... [that pursuit], it is well settled that not only should this Court begin its investigation with the words of the statute, but we are bound by those words if their import is clear and unambiguous." *United Parcel Service v. Comptroller*, 69 Md.App. at 469, 518 A.2d 164. "The statutory language itself provides the clearest indication of the legislative intent and is thus the primary source for all statutory construction." *Id., citing Board v. Stephans*, 286 Md. 384, 408 A.2d 1017 (1979).

[5] The statutory language in Md.Ann. Code art. 64A is clear and unambiguous. Under § 1 of that article *all*

employees of the State are deemed "classified" unless they have been specifically exempted from that category. *See Secretary, Md. Dept. of Personnel v. Bender*, 44 Md.App. 714, 715, 411 A.2d 107, 108 (1980), *aff'd*, 290 Md. 345, 430 A.2d 66 (1981).

**[6]** The State suggests that the "expert training and qualification" proviso of Md.Ann.Code art. 64A, § 3(13) authorizes the creation of the Deputy Administrator's job as an unclassified position. The hearing judge noted that § 3(13) established four criteria for exemptions from classified service. Those four criteria are:

> "1. There must be a State position.
>
> 2. The Secretary of Personnel must determine that the position requires medical, engineering, scientific, educational or expert training and qualifications and should be unclassified.
>
> 3. The Governor must concur in that. . .[determination].
>
> 4. There must be at least some indication that . . .[expert] training and qualifications are required; in other words . . . [the expert training and qualification provision] cannot be used as a subterfuge to defeat the system."

Our review of the record indicates that the findings on which the decision of the Department of Personnel grounded its determination were insubstantial and for the most part unrelated to the statutory mandate of § 3 of art. 64A.

The findings of fact enumerated in the arbitrator's proposed decision of February 22, 1984, were:

1) that as of the time of his employment Deputy Administrator Billhimer was "coded" in the unclassified service; "[h]e never sat for an examination, for . . . [the] position nor was he selected from any State eligible list";

2) that the survey which led to the creation of the job of Deputy Administrator referred to the job as being "unclassified" because of "the sensitive nature of the position";

3) that the position was established under an "unclassified Class Code";

4) that a memo from a classification analyst made reference to a letter from the Secretary of Personnel agreeing that *all* positions in SABEL should be unclassified;

5) that when Billhimer was promoted to the Deputy's position he was neither subjected to a written examination nor was he selected from a list of eligible persons.

None of the findings satisfies the statutory requirements. Despite the shortcomings of the fact finding process, the arbitrator, in her "proposed conclusions of law" summarily declared: "Clearly, the Deputy Administrator position is one requiring definite and specific expertise."

[7] What was clear to the arbitrator is far from clear to us. Not one of the "proposed findings of fact" supports that conclusion. Nothing in the "fact finding" indicates any particular "expert training or qualification" needed to fill the position of Deputy, nor do the "findings" suggest that Billhimer uniquely satisfies art. 64A, § 3(13). The statutory requirement that every personnel decision be accompanied by "findings of fact" is not sated by one-sentence conclusions. *Ocean Hideaway Condominium Ass'n v. Boardwalk Plaza Venture*, 68 Md.App. 650, 515 A.2d 485 (1986). Administrative agencies must provide reasons for their decisions. *Id.; see also Tron v. Prince George's County*, 69 Md.App. 256, 517 A.2d 113 (1986).

The State further argues that the Department of Personnel, in fact, made a finding that the Deputy Administrator position requires special expertise. That argument fails for at least two reasons: One, that a *survey team* in a *draft proposal* recommended that a position be created for someone "to take charge of the routine day-to-day decisions" is far short of the statutory requirement that a determination be made by the Secretary of Personnel that "the position requires medical, engineering, scientific, educational or expert training and qualifications." Two, the survey team recommendation was *not* a "finding" that was relied upon by the arbitrator in his decision.

The arbitrator's second order, that of January 29, 1986, which followed the remand from the circuit court, contains similar fallacies. The arbitrator's decision reaffirmed the previous decision but on a different basis. She concluded that Billhimer had always been in an "unclassified position" code series, and that, although he had taken an examination, he had never competed for the job of the Deputy position. The standard imposed by art. 64A, § 3(13) was not mentioned, much less discussed in the course of that decision.

At the hearing following the remand from the circuit court, Billhimer testified that it was his understanding that the examination that he took for the chief clerk position was to qualify him for merit system status. Aside from that testimony, the hearing focused on the coding of employment positions and the meaning of that coding. The State introduced into evidence an informal memo dated December 3, 1969:

> "Commissioner Bosz contacted the Governor's Office and it is their intention that all positions in this agency should be exempt. It was felt that the legislation creating this agency intended that this be so even though it wasn't specifically stated. Part of the functions for the new agency were formerly performed by the Secretary of State's Office. There is a feeling that this new agency is directly tied to the Executive Department which is exempt from the Merit System. The Governor had promised the new Administrator that he could employ any person he desired.
>
> We are processing the BB40's as 9000 codes in accordance with the above."

The memorandum was written "For File" by Robin J. Zee. Mr. Zee was identified in the record as being the then Director of the Division of Classification and Compensation. The memorandum was written eight years before the establishment of the position of Deputy State Election Administrator. We are not told who in the Governor's office was contacted by Commissioner Bosz (later Secretary of Personnel), nor who in that office expressed "*their* intention that all positions be exempt" (emphasis supplied). The only reason stated in the memo for treating SABEL employees as unclassified is the direct relationship of SABEL to the Executive Department

and an alleged promise by the Governor that the "Administrator could employ persons he desired." There is no indication in the memorandum that there was a determination made that the positions in SABEI would be exempted because they required "medical, engineering, scientific, educational or expert training and qualifications." None of the grounds mentioned in the memorandum satisfies the requirements of art. 64A, § 3(13).

In *Tron v. Prince George's County*, 69 Md.App. at 270-71, 517 A.2d 113, this Court, speaking through Judge Bishop, said:

> "Not only what ... [an administrative agency] decides, but also how it decides is crucial:
>
> [F]indings are essential, and necessary to permit the court properly to review a decision or order, and the absence of findings precludes adequate judicial review. Findings are needed to aid a court in determining whether there is sufficient evidence to support an agency decision, and whether the facts offer a reasonable basis for the order entered, and whether it is based on a proper principle.
>
> ...
>
> In addition, a purpose of administrative findings is to apprise the parties with respect to the reason for the administrative action as an aid to them in deciding whether additional proceedings should be initiated and, if so, on what grounds. Thus, administrative findings have been held to be necessary to assist the parties in planning their cases for rehearing and judicial review."

We think Judge Cawood, in reversing the agency, correctly opined, "While we might permit informality in such matters, the record is ... totally devoid of anything which satisfies the statutory exemption. While we have an aversion to bureaucratic red tape, we believe here there is no tape at all."

[8] Lastly, the State asserts that Billhimer was always an unclassified employee. That fact, the State says, was shown by the personnel code numbers of his previous positions. Because Billhimer knew the code meaning, the State avers, he should not benefit from his delay in challenging his status.

The State's emphatic assertion that appellee's status is proven by his code numbers is ill founded and appears to be based

on a theory of bureaucratic osmosis, *i.e.*, a gradual absorption into an unclassified status by virtue of misidentification. The issue here is not, however, what the Department of Personnel *thought* Billhimer's status was, but *how* it reached its conclusion. "The fact that a position is carried on the payroll as being in the unclassified service does not establish that classification." *Henslee v. State Personnel Board of Review*, 239 N.E.2d 121, 15 Ohio App.2d 84 (1968).

Moreover, the record is utterly devoid of any evidence that Billhimer either knew what his classification number was or that he comprehended the meaning of the classification code number. On the contrary, there is uncontroverted evidence that Billhimer passed an examination that qualified him for classified service. Irrespective of the effect the examination had or should have had on his status, Billhimer possessed some reason to believe that he was a classified employee.

Even if Billhimer knew that he was "coded" as an unclassified employee, we would still reject the State's argument. In *United Parcel Service v. Comptroller*, 69 Md.App. a 473, 518 A.2d 164, quoting from *St. Dept. of A. & T. v. Greyhound Comp.*, 271 Md. 575, 589, 320 A.2d 40, 48 (1974), we restated that the " 'unvarying construction of a law by the agency charged with its enforcement over a long period of time ... cannot override the plain meaning of the statute or extend its provisions beyond the clear impact of the language employed.' "

One of the purposes of the Maryland merit system, Judge Lowe wrote for this Court in *Secretary, Md. Dept. of Personnel v. Bender*, 44 Md.App. 714, 715, 411 A.2d 107, 108 (1980), "is to provide standards of employment and advancement, ... intending to avoid problems inherent in political spoils systems, such as nepotism and related abuses." To the extent that the Maryland Code sets forth procedures for exempting employees from the benefits of the merit system, Billhimer is entitled to its fair and accurate application. It follows that we agree with Judge Cawood that this case must be remanded to the agency for a merits hearing.

JUDGMENT AFFIRMED.
COSTS TO BE PAID BY APPELLANT.

APPENDIX E

| | |
|---|---|
| EDWIN S. BILLHIMER,<br>*Appellant,*<br>v.<br>STATE ADMINISTRATIVE BOARD OF ELECTION LAWS,<br>*Appellee.* | In the Circuit Court for Anne Arundel County Consolidated Case Nos. 1108187 and 1112006 |

**ORDER**

Pursuant to Maryland Rule B13 and in accordance with this Court's Opinion of December 1, 1986, the decision of the Department of Personnel is REVERSED.

SO ORDERED, this 18th day of December, 1986.

/s/ JAMES C. CAWOOD, JR.
James C. Cawood, Jr.

TRUE COPY,

TEST:
H. Erle Schafer, Clerk

/s/ JEAN L. FRANK Deputy

APPENDIX F

IN THE MATTER OF AN APPEAL OF A REJECTION ON PROBATION IMPOSED UPON

EDWIN S. BILLHIMER
DEPUTY STATE ELECTIONS ADMINISTRATOR

STATE ADMINISTRATIVE BOARD OF ELECTIONS

Before Eleanor Wilkinson
A
Representative of the Secretary of the Department of Personnel
Case #O-498

## ORDER OF THE ARBITRATOR

January 29, 1986

On March 21, 1984, this office issued a decision in Case #O-498 finding that Mr. Edwin S. Billhimer, Deputy State Elections Administrator, was not a classified employee. Mr. Billhimer appealed that decision to the Circuit Court for Anne Arundel County and by order of May 13, 1985, Judge James A. Cawood, Jr. remanded the matter to the State Department of Personnel "for the reception of additional evidence as to whether the Appellant ever sat for a qualifying examination which would have qualified him for classified status within the State merit system and whether he had to compete for his position as deputy administrator in line with our opinion of February 15, 1985."

A hearing for that purpose was convened by the undersigned Senior Arbitrator on July 1, 1985. Mr. Billhimer was present and was represented by Mr. William Franch, Attorney-at-Law. Appearing on behalf of the State Administrative Board of Elections was Mr. Ralph Tyler, Assistant Attorney General.

## DISCUSSION OF TESTIMONY

Mr. Billhimer presented evidence that on January 15, 1972, he sat for and passed with a qualifying score an examination for the classification of Election Chief Clerk administered by the Maryland Department of Personnel. He readily admitted that during his entire tenure at the State Administrative Board

of Elections, from August 16, 1971 until December 31, 1982, he never held that position. He did perform those duties in Baltimore City when he was temporarily assigned to assist in that office while he was an employee of the State Administrative Board of Elections. During the temporary reassignment, he remained in his existing State classification and salary.

Testimony and evidence were presented by Ms. Anne Hearn, who has been with the Department of Personnel for twenty-three years and served as the Director of the Division of Salary Administration and Position Classification for over five years, on behalf of management.

—

## FINDINGS OF FACT

1. Mr. Billhimer's official record of employement with the State shows that he served in the positions of State Supervisor of Voting Machines under classification codes 5421, 9727 and 7218 and Deputy State Election Administrator under classification codes 9886 and 7219 between August 16, 1971 and December 31, 1982.

2. The description of the Classification Code ranges published by the Division of Salary Administration and Position Classification on May 19, 1980 provides the following descriptions:

   6. 5001-5799—Exempt from the Merit System, Under Our Classification and Salary Jurisdiction, Unique Title

      The group comprises unique title classifications, as contrasted with the 6001-6899 group.

   11. 7000-7899—Exempt from the Merit System and from Our Salary Jurisdiction

      This group is the same as 9001-9999 except that increments and general increases are processed automatically, in the same manner as for all other employees. The group was implemented in July, 1978, as a computer coding device for this purpose.

9001-9999—Exempt from Merit System and from Our Salary Jurisdication

This includes Assessors in *local* merit systems, statutory, budget-controlled, appointive classes, and classes for which (by separation of powers principle) we perform only a record-keeping function. The group differs from group 11 in that a form MS-310 must be sent in by the agency to make each and every salary change.

3. Late in 1969, the Governor's Office informed then Commissioner of Personnel Henry Bosz that it was their intention that all positions in the State Administrative Board of Elections be exempt from the Merit System.

## CONCLUSIONS OF LAW

While the appellant has presented incontrovertible evidence that he indeed passed a Merit System examination for Election Chief Clerk, the successful completion of such a test is only the first step toward obtaining a position within the Merit System. To become a classified employee, an individual must then be selected from an eligible list and placed in a position within the classified service. This Mr. Billhimer has never done.

Nothing presented at the July 1, 1985 hearing has caused me to alter the conclusions reached in my February 22, 1984 decision. Based on Ms. Hearn's expert testimony, I must again conclude that Mr. Billhimer never has been and, at the time of his termination, was not, a classified employee.

/s/ ELEANOR WILKINSON
Eleanor Wilkinson
Employee Relations Senior
Arbitrator

EW: mmo
CC: Wm. A. Morris
Carol S. Evans
William Franch
Edwin S. Billhimer
Anne Hearn
Ralph Tyler

APPENDIX G

IN RE: APPEAL OF TERMINATION OF AN UNCLASSIFIED EMPLOYEE

EDWIN S. BILLHIMER
DEPUTY STATE ELECTIONS ADMINISTRATOR

vs.

STATE ADMINISTRATIVE BOARD OF ELECTION LAWS

Before Eleanor S. Lutzker
A
Representative of the Secretary of the Department of Personnel
Case #O-498

**ORDER OF THE SECRETARY**

June 8, 1984

On March 21, 1984 the Director of Employer-Employee Relations Charles R. Hennick rendered a final order in Case O-498 setting the case for hearing under the provisions of COMAR 06.01.01.60A, which limits Mr. Edwin S. Billhimer's appeal to the legal and constitutional bases for the termination.

The case was set for hearing on that basis for May 28, 1984. By letter of May 23, 1984 Mr. David C. Barclay, Attorney to Mr. Billhimer informed this office "Mr. Billhimer knows of no illegal or unconstitutional bases for this termination."

IT IS THEREFORE ORDERED this 8th day of June 1984 that Mr. Edwin S. Billhimer be separated from his Deputy State Elections Administrator position effective December 31, 1982.

/s/ THEODORE E. THORNTON, SR.
Theodore E. Thornton, Sr.
Secretary of Personnel

Distribution:
Edwin Billhimer
David C. Barclay, Esq.
Willard Morris
Ralph S. Tyler, Esq.
William A. Franch, Esq.

IN RE: APPEAL OF TERMINATION OF AN UNCLASSIFIED EMPLOYEE

EDWIN S. BILLHIMER
DEPUTY STATE ELECTIONS ADMINISTRATOR

vs.

STATE ADMINISTRATIVE BOARD OF ELECTION LAWS

Before Eleanor S. Lutzker, A Representative of the Director of the Division of Employer-Employee Relations
Case #O-498

## ORDER OF THE DIRECTOR

March 21, 1984

The attached Proposal for Decision, including Findings of Fact and Conclusions of Law, was served upon the parties named on February 22, 1984.

Mr. Billhimer, through his representative, filed exceptions to the proposed decision in a timely manner. Argument was presented by representatives for both parties on March 19, 1984 before the Director of the Employer-Employee Relations Division.

I have reviewed and considered the record in the case. The employee's request to have considered two documents submitted with the exceptions filed in this case is denied. The documents in question, an organizational chart and the results of an examination, do not qualify as newly discovered evidence, as the employee knew, or should have known, that it was in his possession at the time of the hearing of this case.

I adopt all proposed findings of fact and conclusions of law as final findings of fact and conclusions of law and hold that Mr. Billhimer's appeal is limited to the provision of COMAR 06.01.01.60A.

## ORDER

IT IS THEREFORE ORDERED this 21st day of March, 1984 that the case be set for a hearing under the provisions of COMAR 06.01.01.60A which limits his appeal to the legal and constitutional bases for the termination.

/s/ CHARLES R. HENNICK
Charles R. Hennick
Director
Employer-Employee Relations

Distribution:
Mr. Edwin Billhimer
Mr. William A. Franch
Mr. David C. Barclay
Mr. Ralph S. Tyler

APPENDIX H

**HOUSE OF DELEGATES**

91r0885 No. 617 P4

By: Delegate Perkins (Departmental—Admin. Bd. of Election Laws) Introduced and read first time: January 26, 1989
Assigned to: Constitutional and Administrative Law

**A BILL ENTITLED**

AN ACT concerning

State Administrative Board of Election Laws—Employees

FOR the purpose of establishing that the employees of the State Administrative Board of Election Laws are in the classified service; generally relating to the employees of the State Administrative Board of Election Laws; and making this Act subject to a certain contingency.

BY adding to

Article 64A—Merit System
Section 9X
Annotated Code of Maryland
(1988 Replacement Volume and 1988 Supplement)

**PREAMBLE**

WHEREAS, In Chapter 351 of the Acts of the General Assembly of 1971, the General Assembly included in the classified service of the State certain employees of the boards of supervisors of elections; and

WHEREAS, The General Assembly did not include in the classified service the employees of the State Administrative Board of Election Laws; and

WHEREAS, As a matter of sound public policy, the employees of the State Administrative Board of Election Laws generally should be included in the classified service; now, therefore,

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article 64A—Merit System

9x.

ON AND AFTER JULY 1, 1989, ALL PERMANENT EMPLOYEES OF THE STATE ADMINISTRATIVE BOARD OF ELECTION LAWS, BOTH FULL TIME AND PART TIME, SHALL BE IN THE CLASSIFIED SERVICE OF THE STATE, WITHOUT FURTHER EXAMINATION OR QUALIFICATION AND WITHOUT DIMINUTION IN SALARY OR BENEFITS, AND SHALL BE SUBJECT TO THE JURISDICTION OF THE SECRETARY OF PERSONNEL.

SECION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 1989 contingent upon the failure to take effect of H.B. 113 (91r0639) and if Chapter _____ (H.B. 113) (91r0639) becomes effective, this Act shall be null and void without the necessity of further action by the General Assembly.